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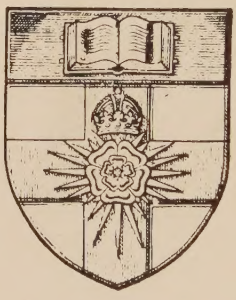

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IN IRELAND,

AND

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CORRIGENDA.

Page 156, top line, *for* "Alexander," *read* "James."
,, 236, top line italics, *for* "1903," *read* "1893."
,, 248, line 4 from foot, *after* "*Pigot*" *read* "and *P. S. Walsh*."
,, 334, line 15, *for* "1869" *read* "1867."
,, 556, line 2, *for* "Fellows' Hall," *read* "College Hall."
,, 585, line 10 from foot, *after* "show" *read* "cause."
,, 589, line 17, *insert* "*Molony, K.C.*," as counsel for the Attorney-General, with *Dudley White*.
,, 607, line 10 from foot, *for* "his," *read* "whose."

NOTE.

THE COURT OF APPEAL have affirmed the decisions of Ross, J., in *Aldritt* v. *Maconchy* ([1906] 1 I. R. 416), and of BARTON, J., in *Bradshaw* v. *Bray U. D. C.* ([1906] 1 I. R. 560).

On the 30th October, 1906, the following resolution was passed by the Bar :—

"The Bar of Ireland hereby record their deep sense of the great loss which the Bar and the public have sustained by the retirement from the Bench of the Right Hon. Sir Andrew Marshall Porter, late Master of the Rolls, and they desire to express their appreciation of the great learning and power, the firmness and impartiality, and the commanding dignity, combined with unvarying courtesy and kindness, with which he administered justice and equity throughout his judicial career. The Bar hereby tender to him their sincere good wishes that he may long enjoy, in health and happiness, the rest which he has so well earned."

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1906.

THOMSON, LANDLORD; HAGAN, TENANT (1).

Appeal.
1905.
April 15.
May 20.

Landlord and tenant—Agreement to become tenant of portion of holdings formerly held by tenant at an increased rent—Future tenant—Negotiation by agent for tenant—Land Law (Ireland) Act, 1881, *s.* 21.

F. was tenant of three small holdings in the county of Monaghan, comprising about 12½ acres (Irish), at the rent of £4 15*s.*, held under three leases for lives, of which F. was the survivor. F. died in 1890, having by will left the farm to his wife, the present tenant. The landlord demanded possession, and on the 11th September, 1890, the tenant served originating notices to fix fair rents with respect to two of the holdings. Negotiations were then entered into, in which M. acted as agent for the tenant, which resulted in an agreement being made between the parties, dated the 18th February, 1891, by which the tenant agreed to become yearly tenant to the landlord of portion of the lands, consisting of 9 acres, comprised in the three original leases, at the rent of £14, a small portion being surrendered:—

Held (by the Lord Chancellor and Walker, L.J.; *dissentiente* Holmes, L.J.),

(1) Before LORD ASHBOURNE, C., and WALKER and HOLMES, L.JJ.

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THOMSON, *Landlord*; HAGAN, *Tenant.*

as the tenant had not authorised M., as her agent, to resign her *status* as a present tenant, and as there was nothing in the agreement inconsistent with the retention by her of her *status* as such, that neither the shrinkage in the area, nor the consolidation of the holdings, nor the alteration in the rent, destroyed the present tenancy which existed in 1890.

APPEAL from an order of Meredith, J., dated the 15th February, 1905, by which he declared that the tenant, Mrs. Hagan, was entitled to a present tenancy, but dismissed the originating notice on the ground that the statutory tenancy under which she held had not expired.

The holding originally consisted of 14A. 3R. 5P., portion of the lands of Bushford, in the county of Monaghan. It was held under three leases from Robert Thomson, the predecessor in title of the landlord, to Isaiah Falkiner, the first husband of the tenant, Mrs. Hagan.

The first lease was dated the 17th November, 1846, and comprised 6A. 3R. (Irish plantation measure), and 1 rood of bog, at the rent of £2 17*s.* 2*d.*, for the lives of Isaiah Falkiner and Essie Falkiner (his first wife), and the survivor of them. For this lease a fine of £160 was paid.

The second lease was dated the 15th February, 1851, and demised 4A. 3R. 35P. for the life of Isaiah Falkiner at the rent of £1 19*s.* 9*d.* For this lease a fine of £86 was paid.

The third lease was dated the 22nd May, 1855, and demised 1 acre (Irish measure) at the rent of 8*s.* for the life of Isaiah Falkiner. In this lease a fine of £15 was paid. The entire amount comprised in the three lettings was 12A. 2R. 26P. (Irish measure).

There was a small house on the land comprised in the first lease of 1846, which was subsequently enlarged by the lessee, and out-offices were built. The first two leases contained elaborate provisions as to timber and plantations.

Isaiah Falkiner died on the 22nd July, 1890, having by his will devised the lands in question to his wife, Susanna Falkiner, who afterwards became Mrs. Hagan. On his death the landlord demanded possession, and on the 4th September, 1890, Mr. M'William, on behalf of the tenant, served two originating notices to have fair rents fixed in respect of the lands comprised in

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the leases of 1851 and 1855; but no originating notice was served in respect of the land comprised in the lease of 1846.

On the 6th December, 1890, the landlord brought three separate ejectments on the title in respect of the lands comprised in the three leases. Negotiations were entered into with a view to a settlement, in which Mr. M'Cullagh acted as agent for the tenant. A long correspondence ensued, from which it appeared that M'Cullagh was authorized by the tenant to act as her agent for the purpose of arranging with the landlord about the rent to be paid in future, and also as to giving up portion of the lands comprised in the leases. It was ultimately arranged that the tenant should retain the lands comprised in the lease of 1846, except the bog, and another small portion of the take, that she should surrender 4A. 0R. 15P. of the take under the lease of 1851, and retain the 1 acre demised by the lease of 1855. The rent agreed upon for the whole was £14. On the 25th December, 1890, M'Cullagh wrote to the landlord as follows:—

> "I saw J. (1) yesterday, and though he did not say so, I fancy he is not too well pleased at the case being settled, and said the proper way now would be to let the case go on, and for you to get judgment against Mrs. Falkiner. I said that is all utter nonsense, and I am quite certain she would not agree to this. She will at once give up possession of the 5 acres and the bog, and sign an agreement to rent the remainder, which is all that is necessary. He said—'Oh! very well.' I think it will be best to get J. to draw out the agreement, and the shorter and simpler it is the better. She will then be what is called a 'future tenant,' and cannot go into the Land Court. You cannot ask her to preserve game; all you can do is to reserve all game to the landlord, and you are quite entitled to reserve a way into the Plantation. J. may, if you wish, put into it that she has no right to cut turf or cut up the meadow; but it is quite unnecessary, as she cannot do it in any case. J. told me that counsel's opinion was doubtful whether you could put her out or not; but be sure you say nothing of this to him."

On the 18th February, 1891, Mrs. Hagan signed an agreement to become tenant in the following terms:—

> "I hereby agree to become yearly tenant to Colonel Thomson, Ballyfair House, Curragh Camp, county of Kildare, of that part of the farm

(1) The landlord's solicitor.

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of land held by the late Isaiah Falkiner in the townland of Bushford, in the county of Monaghan, on which the dwelling-house and offices are situated, together with the meadow attached, containing in all 9 acres statute measure, be the same more or less, and to pay for same the yearly rent of £14 in two half-yearly payments, at each 1st day of May and 1st day of November, the first of such payments to be due and payable on the 1st day of May, 1891. I further agree to pay the whole of the county cess payable out of said holding and tenant's proportion of poor rates, and also to allow to the landlord a free pass through said farm to the Plantation which lies between the said farm and the townland of Clossiagh. I also agree not to make any turf nor any waste in said meadows, not to set or sublet the farm, or any portion of it, without the landlord's consent in writing, under a penal rent of £5 yearly. All game reserved to the landlord."

On the 9th September, 1903, the landlord served notice to quit, and brought an ejectment, and the tenant served an originating notice to fix a fair rent. The Sub-Commission dismissed the originating notice on the ground that the holding was held under a future tenancy. Meredith, J., reversed this decision, and the landlord appealed.

***Matheson**, K.C., Harrison, K.C.*, and *Chaytor*, for the appellant.

***Cherry**, K.C., Healy, K.C.*, and *Dromgoole*, for the respondent.

May 20.

LORD ASHBOURNE, C. :—

This is an appeal from Meredith, J., and turns upon what legal effect should be attributed to an agreement dated the 18th February, 1891, having regard to the provisions of the Irish Land Act of 1881. The narrow question in the case is—Did that agreement make Mrs. Hagan a future tenant, and deprive her of her previous status of a present tenant? I do not discuss any other points in the case, as I believe we all concur with Meredith, J., in his view with reference to them.

It is not, I think, suggested that either party expressly mentioned or considered that by the agreement Mrs. Hagan was becoming a future tenant. The contention of the appellant rather is that by conclusion of law the effect of the agreement of 18th February, 1891, was to convert Mrs. Hagan into a future tenant. I do not think that either party ever thought of the distinction

between present and future tenants in the negotiation for, or the conclusion of, the agreement; and I have no doubt that if Mrs. Hagan had been told that her entering into the agreement would destroy her present tenancy, she would at once have refused to have anything to say to it. Thus, the appellant's argument really seeks to impute to the agreement a meaning never dreamed of by the respondent, and which she would have at once repudiated if it had been hinted to her as a possibility.

Fortunately, the negotiations were mainly carried on by correspondence—all in existence, and in which a common friend of both parties, acting in perfect good faith, played the leading part.

The facts of the case are few and simple. Isaiah Falkiner, the first husband of the respondent, was tenant to Colonel Thomson of a small farm held under three leases, the rents of which were always paid in a bulk sum. Falkiner died on the 22nd July, 1890, having made his will, by which he gave to his wife, the respondent, this farm and all his chattel property. When he died, although he did not know it, there was legally in existence a present tenancy in all the lands comprised in his farm.

The landlord demanded possession, and this led to the service of fair rent notices on the part of the tenant, and then to the negotiations which followed. Mr. M'Cullagh, a mutual friend, was the go-between, and it was through his instrumentality the agreement of the 18th February, 1891, was arrived at. In substance the agreement involved the surrender of some four or five acres to the landlord, and the payment of a bulk rent of £14 to him for the residue of the farm by the tenant, Mrs. Hagan. The only question in the case is, in my opinion, What is the meaning and effect of the letters that preceded and led up to the agreement? I would infer from its terms that the main struggle between the parties was as to the amount of rent that should be payable; and that it was ultimately agreed that she should pay a bulk rent of £14 for the land she retained. There was no hint that any change had, by the agreement, been made in her *status* until Mr. M'Cullagh's letter of the 25th December, 1890. [The Lord Chancellor read the letter, *ante*, p. 3.]

This allusion to Mrs. Hagan's becoming a future tenant was entirely without warrant or authority from her. She knew nothing

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Lord Ashbourne, C.

about the statement at the time, and, very likely, unless explained, she would not know the significance of the description of *future* tenant. Part of the old farm was given up, and the rest was retained. There was no change of possession of the part she retained. Mrs. Hagan never surrendered, and Colonel Thomson never took possession of that portion. The question therefore simply is—What is the import of the agreement, having regard to the diminished area, and the increased rent? [His Lordship read the agreement of the 18th February, 1891, *ante*, p. 3.]

I do not see anything in the agreement to alter her *status*. I think that the case of *Conroy* v. *Marquis of Drogheda* (1) applies, and it has always been referred to as an authority to be carefully followed. In that case the enlargement of a farm did not destroy the present tenancy; and in *Gordon's Case* (2) the surrender of part of a holding and a change of the rent was held not to create a new tenancy. The case of *Fitzsimons* v. *Ellis* (3) strongly supports the correctness of the decision in *Conroy* v. *Drogheda* (1). It would, in my opinion, be unreasonable and unjust to force upon parties a change of tenure they never dreamed of. I know of no legal principle which coerces us to disregard and override intention on facts like those which exist in the present case. *Torrens* v. *Cooke* (4) does not affect this conclusion, as there was a clear surrender—a lease was taken, and a lease was given up. In my opinion the judgment of Meredith, J., was correct, and should be affirmed, and the appeal dismissed with costs.

WALKER, L.J.:—

The question in this case is whether the agreement of the 18th February, 1891, under which Mrs. Hagan agreed to hold on as yearly tenant at an increased rent, two substantially of the three takes she held under Colonel Thomson, altered her *status* of present tenant, and, either in fact, as a matter of intention, or by conclusion of law by force of the agreement itself, made her a future tenant.

In my opinion, if we were to so hold, we should be acting

(1) [1894] 2 I. R. 590.
(2) 26 I. L. T. R. 95.
(3) [1895] 2 I. R. 698.
(4) 22 L. R. Ir. 239.

contrary to the intention of both landlord and tenant, and I think the principle of the decision in *Conroy* v. *Lord Drogheda* (1) applies to the case.

The correspondence beginning on the 21st October, 1890, and ending on the 22nd March, 1891, carried on principally by the friend of both parties, shows, I think, clearly what both parties intended, but certainly what Mrs. Hagan intended.

In order to appreciate it, we must see the position of the parties when the correspondence commenced.

Isaiah Falkiner, the husband of Mrs. Hagan, was tenant to the Thomson family of what was included in the agreement of the 18th February, 1891, and some 5 acres in addition under three leases made to himself. The lands were worked together, and one bulk rent was paid. The three leases were—(1) 17th November, 1846, of 6A. 3R. 0P., and a rood of bog, at the rent of £2 17*s*. 2*d*., for the lives of the lessee and his wife, for which a fine of £160 was paid; (2) 15th February, 1851, of 4A. 3R. 35P., at £1 19*s*. 9*d*., for the life of the lessee, for which a fine of £86 was paid; and (3) 22nd May, 1855, of 1 acre at 8*s*., for the life of the lessee, for which a fine of £15 was paid. The first wife died, and Falkiner, about 1880, married the present tenant, and he died himself on the 22nd July, 1890, having made a will by which he devised to his wife—"my farm of land in Clonshabeg and all my chattel property." Falkiner had also held under another landlord a small farm, immediately adjoining, worked with the others; and if it be material, I would think the devise would include all the farms: but nothing turns on this. Now it is plain that when the lessee died in 1890 there was a present tenancy in each of the three takes, apart from any question of the lands in the lease, or any of them, being demesne lands under the law as it stood at that date.

I am myself of opinion, with Mr. Justice Meredith, that even the lands in No. 2 lease, as to which Mrs. Hagan's solicitor seems to have considered a question might be raised, were not demesne; but I assume that the landlord was prepared to contend that the lands were demesne if the arrangement of 1891 had not been come to.

(1) [1894] 2 I. R. 590.

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The landlord demanded possession, and on the 11th September, 1890, two originating notices in respect of No. 2 and 3 holdings were served. The solicitor stated he was satisfied there was no case for the landlord as regards No. 1, farthest away from the mansion-house, on which the tenant's dwelling-house is, which had been improved and added to by the tenant.

It is obvious that if fair rent proceedings had been successfully prosecuted, the rents of the holdings would have been substantially increased from the very low ones paid by reason of the fines.

It appears that in October, 1890, the landlord named to Mrs. Hagan the increased rent he would be willing to take for all. They deal with all as one farm, and Mrs. Hagan wrote to him on the 21st October—"I hope you will be kind enough to write to me and let me know what rent you want me to pay you, as I am very willing to give you what any of my neighbours are paying you by the acre."

His reply is—"I could not take less for the farm than what I offered to let you have it for." It appears subsequently his offer was £2 an acre. This shows what the parties had in contemplation, viz., an increase of rent only; and if she had then accepted his demand of £2 an acre, I cannot see any ground for contending that a future tenancy was created.

However, Mr. M'Cullagh, a mutual friend, intervened, and mainly at his suggestion the original idea of holding all at an increased rent was altered by her giving up the rood of bog in lease No. 1, and substantially the whole of lease No. 2, and paying the increased rent for the balance. He first suggested to the landlord to give the whole farm for £18. He then wrote to her suggesting to make an offer, and she writes on 25th November:—"I would feel very thankful to you if you would give him an offer for me, as I do not understand what I should give. If he does not take your offer, I hope he shall have no objection to leave it to the Land Commission." "P.S.—I think the first part would be enough for me." Mr. M'Cullagh wrote to him that she was willing to give up one take and the bog, and pay £13 rent. He evidently wrote back that it should be £14, because M'Cullagh writes:—"Though you are a little tight on the widow, I will, for her, accept your offer. I will undertake that she will give you up

the last take and bog at once, and pay you the yearly rent of £14 for the other two takes. I am very glad this matter is settled both on your account and hers, and you may believe me it is the best agreement you could make." He writes her what he had arranged, and asks: "Are you satisfied with what I have done, and will you take a lease for your own life, or just hold it as tenant from year to year?" Mrs. Hagan replies agreeing, but adding—"I quite object to take a lease for my own life; I would just like to hold it as tenant from year to year. I might, in the course of some years, buy it out from him. I will give up possession of the fields and bog any time." She writes to Colonel Thomson on the 23rd December:—"I have received a letter from Mr. M'Cullagh saying he had settled the matter. He told me that he had offered you £14, and that you were satisfied."

Thus the matter was finally arranged, and, as I read it, the arrangement, as both parties understood it, was that she should hold on what she did not give up under the *status* which devolved on her in 1890 of yearly tenant, but at an increased rent, and that it would be as foreign to the intention of the landlord as to hers that she was to assume a new tenure under which she could be put out by a six months' notice. Both got consideration for what was done; her *status* was affirmed, but she paid an increased rent, which from the first was all the landlord asked, and we are remitted as to the part retained to the *status* she would have had if she had simply agreed to pay an increase for the whole.

Mr. M'Cullagh's commentary in the subsequent letter of the 25th December, that she would be a future tenant, is without warrant from her, and came after all was settled.

It appears that Mr. Wright issued three ejectment processes, but those were withdrawn. Mr. Wright advised to go on and get decrees, but Mr. M'Cullagh said she would never consent to this, and she was not asked, and possession was neither asked nor given.

Then comes the agreement of 18th February, 1891. [The Lord Justice read the agreement, *ante*, p. 3.]

That is simply giving up part and retaining what is called that part of the farm on which the house and offices are situate at an ascertained increased rent.

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Walker, L.J.

I think as regards her certainly the facts show a present intention to retain her *status*, and on the part of the landlord, at least, an absence of intention to alter it. I am prepared to go further and say he acquiesces in an inability to disturb her as to the part retained, and her right not to be disturbed rested on her *status* of present tenant which she asserted by her originating notices. He got all he asked for—increased rent.

I think the principle of *Conroy* v. *Drogheda* (1) applies. I do not think there was any surrender of her present yearly tenancy.

Conroy's Case (1) was in this respect stronger, that there was an additional 10 acres thrown in, and I agree that the taking of a lease or giving up a lease, as in *Torrens* v. *Cooke* (2), would be a material circumstance. In *Torrens* v. *Cooke* (2) there was an express surrender.

In *Curoe* v. *Gordon* (3) it was held by the Lord Chief Baron that a surrender of part of a holding and a diminution of the rent by arrangement did not create a new tenancy, because there was no intention of creating a new tenancy. *Fitzsimons* v. *Ellis* (4) proceeds upon the same principle. The Chief Baron in *Conroy* v. *Drogheda* (1) rests his judgment that there was no surrender of the present tenancy upon the intention of the parties, and I cannot attribute to Mrs. Hagan an intention the very reverse of what I believe was in her mind. It would almost be a fraud on her now to put her in a position which left her in 1891 at the mercy of a notice to quit. I do not attribute any weight to the statements said to have been made by Isaiah Falkiner before his death, founded upon his supposed belief that the lands were demesne. He had never heard of *Roe* v. *Cooney* (5); and if he did make any statements, they were referable to his idea (mistaken) that the tenure would end with his life.

I think the decision of Mr. Justice Meredith was right, and should be affirmed.

(1) [1894] 2 I. R. 590.
(2) 22 L. R. Ir. 239.
(3) 26 Ir. L. T. R. 95.
(4) [1895] 2 I. R. 698
(5) 14 L. R. Ir. 243.

HOLMES, L.J. :—

In the Land Commission Court the application to have a fair rent fixed was resisted on two grounds—(1) that the holding was, and is, substantially demesne; and (2) that Mrs. Hagan is not a present tenant as defined by the Land Law (Ireland) Acts. For reasons that will appear in the course of my judgment, I am of opinion that Colonel Thomson failed to sustain his first contention; and it thus becomes necessary for me to consider his second defence, which depends upon the inference to be drawn from a few facts which, if not actually admitted, can hardly be disputed. Previous to the year 1846, Colonel Thomson's father was the owner of lands situate in the county of Monaghan, and let to tenants whose rents are stated by the Assistant Commissioner to have amounted to about £2000 a year. In addition to this property, he had in his own hands the lands of Bushford, held under a lease for lives renewable for ever, dated the 7th August, 1751, and containing 118 acres, in addition to some bog-land. It appears from this lease that at its date the demised premises included what is described as the mansion-house, which probably then became the residence of the Thomson family, and continued to be so until it was dismantled by the great and still remembered storm of January, 1839.

The present landlord's father was living in it when it was thus rendered uninhabitable, and he had plans prepared and materials provided for restoring it; but the stables were the only part of the work then carried out. He was probably prevented from doing more by want of money. It appears that his interest in his Monaghan property did not long survive the famine. Parcel after parcel was sold in the Incumbered Estates Court, and a little later he transferred Bushford, the only portion that remained, to his son, now Colonel Thomson. When he obtained possession, all the premises demised in 1751 were in hands except what was contained in three lettings made to a person called Falkiner, by indentures of lease dated the 17th November, 1846, the 15th February, 1851, and the 22nd May, 1855. The first demised 7 Irish acres at an annual rent of £2 17*s.* 2*d.*, the second 5 Irish acres at £1 19*s.* 9*d.*, and the third 1 Irish acre at 8*s.* The term in the first lease was the lives of Falkiner and his then wife; and in the two last, the

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life of Falkiner alone, he having in the meantime become a widower. These instruments contained very elaborate provisions; and the low rents are accounted for by the fact that substantial fines were paid as additional consideration. Colonel Thomson entered the army soon after he got possession of Bushford, and continued therein for seventeen years. He has kept in his own occupation all the land except the portions let to Falkiner; but he did nothing towards rebuilding the mansion-house until 1887. He then began to erect a handsome residence adjoining the stables that had been built by his father; and he has since completed it at the cost of several thousand pounds.

Falkiner seems to have been a man of considerable means, and he replaced the small cottage that he found on the land, first let to him, by a comfortable dwelling-house and good offices.

Some time after the death of his first wife he married the tenant in this case, and when he died in 1890, she continued for a short time in possession of the three holdings.

There is evidence that Falkiner believed that the landlord would be entitled to resume possession on the termination of the leases; and I think that this was also the opinion of Colonel Thomson. His solicitor presumably took the same view, inasmuch as he caused to be served three civil-bill ejectments. On the other hand, Mrs. Falkiner's solicitor, having consulted counsel, applied to have fair rents fixed for the two smaller holdings. In this state of things, Mr. M'Cullagh, a well-known land agent, intervened with the view of effecting an amicable settlement. This gentleman had no personal interest of any kind, and his only desire, so far as I can see, was to serve both parties. The negotiations were conducted almost altogether by correspondence, and fortunately the letters of Mrs. Falkiner, Colonel Thomson, and Mr. M'Cullagh have been preserved. The inference I draw from these documents is that Colonel Thomson was quite willing to allow the widow to hold part of the land, and was not particularly anxious to take up any of it, but that he was determined if it were possible to fix the rent himself; that Mrs. Falkiner preferred to have the rent fixed by the Land Commission, and that Mr. M'Cullagh's ruling motive was to preserve the parties from the expense and uncertainty of litigation. His task was made easier by the

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doubts felt by both the parties and their solicitors as to the result of legal proceedings; and he succeeded in bringing about a settlement with which landlord and tenant expressed themselves satisfied. This was embodied in an agreement dated the 18th of February, 1891, and I have no doubt that Mrs. Falkiner understood perfectly the nature of the arrangement made. Before the agreement she had surrendered a small portion of the first holding, and considerably more than half of the second; and the agreement made her yearly tenant of what remained of the first two holdings, and the whole of the third.

Before considering the effect of this transaction I desire to say a few words about the controversy that led to it. Whether Mrs. Falkiner was entitled to have a fair rent fixed depended upon whether her holdings were or were not demesne. I am not surprised that this was regarded by everyone interested as a matter of doubt. A good deal might have been said on both sides; but it is unnecessary for me to consider the point, for the simple reason that even if the land had been demesne at the death of Falkiner, the effect of the new agreement was to deprive the portion of the holdings thereby let of this character, and such portion is certainly not demesne now. I therefore assume that on the death of Falkiner his representative, who I shall also assume was his widow, became a present tenant from year to year of the three holdings, pursuant to the provisions of section 21 of the Act of 1881.

Can I hold that these tenancies are still in existence? Can I regard a tenancy in a simple holding of 15 statute acres at a rent of £14 as a continuance of these tenancies, the aggregate area of which was 21 acres, and the aggregate rents of which were £5 4*s.* 11*d.*? If this question had been asked before 1881, no lawyer would hesitate to say that the effect of the transactions I have described was to operate as a surrender of the old tenancies and to create a new one.

It is unnecessary to support such an elementary proposition by authority; but I may refer to the only case relied on as being inconsistent with it.

In *Delmege* v. *Mullins* (1) a tenant who had two distinct

(1) I. R. 9 C. L. 209.

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holdings, one at a rent of £63, and the other at a rent of £21, had his rent of both holdings, which were consolidated into one in the landlord's rent-book, increased to a bulk rent of £103, which was paid for some time. A notice to quit was served for the holding thus consolidated; and the only question argued in the Court of Common Pleas was whether there was sufficient evidence of such a new arrangement as would, under ordinary circumstances, constitute a new tenancy. The Court held that a new arrangement had taken place which was not alone an alteration of the rent, but a consolidation of the farms which were formerly distinct holdings, held under distinct lettings, and at distinct rents.

Accordingly, it was decided that this arrangement constituted a new demise. There was then an appeal to the Exchequer Chamber, which, according to the judgment of Barry, J., agreed with the Court of Common Pleas on the point argued before it; but inasmuch as previous to the consolidation of the two holdings the landlord had granted his estate by way of mortgage, it was held that he had no right to serve a notice to quit or bring an action in his own name without joining the mortgagee. So far, therefore, from this being opposed to the contention of Colonel Thomson, it is a clear authority that a new tenancy was created in February, 1891, unless the Land Law (Ireland) Acts made a difference. But it is, I think, now well settled that they did not. It was once thought that section 20, sub-section 1, of the Act of 1881 had put an end to surrenders by operation of law; but in *Torrens* v. *Cooke*(1), *Conroy* v. *Drogheda*(2), and *Butler* v. *O'Mahony* (3) it was laid down that this provision was only intended to prevent a mere constructive surrender operating as the destruction of the former tenancy and the creation of another, where such surrender was only a part of the machinery made use of for the purpose of carrying out a sale or assignment of an existing tenancy, but was not intended to prevent the *bona fide* surrender of an old and the creation of a new tenancy.

If this view is correct, there can be no doubt that the consolidation of one small holding with portions of the two other holdings

(1) 22 L. R. Ir. 239. (2) [1894] 2 I. R. 590. (3) 32 Ir. L. T. R. 93.

at a single rent, different in amount from any of the rents previously payable, amounted to the creation of a new tenancy.

Indeed, section 17 of the Act of 1896 was evidently intended to alter the law in this respect thereafter by providing, amongst other things, that a tenancy arising from the consolidation, by agreement in the prescribed manner, of a holding with any other holding or portion of a holding, or making an addition to a holding, shall, in the absence of a provision to the contrary, be a present tenancy. If, then, in the case before the Court, I am obliged to hold that the old tenancies were surrendered and a new tenancy created in 1891, how can the judgment of Meredith, J., be supported? Mr. Cherry's argument for the tenant was twofold. He relied on section 18 of the Act of 1896, and tried to show that the landlord had consented that the new tenancy should be a present tenancy, or that the tenant should have the same rights as a present tenant. There is absolutely no evidence of such a consent. On the contrary, it is perfectly clear from the correspondence and agreement that Colonel Thomson never contemplated any such thing; and I find it hard to believe that counsel was serious in presenting this proposition.

His alternative argument is based on the conclusion arrived at in *Conroy* v. *Drogheda* (1). I have already pointed out that this is one of the cases in which it is laid down that the Land Act of 1881 does not prevent the *bona fide* surrender of an old and the creation of a new tenancy; but it was held on the facts proved therein that the old tenancy had never been surrendered, and a new tenancy had never been created. The tenant, being in possession of a holding at an annual rent of £67 10*s*., was induced to sign a document agreeing to become a tenant of this holding, together with 10 additional acres previously in the landlord's hands, as one holding, at the yearly rent of £75; but upon the evidence of the tenant, which was uncontradicted, the Court came to the conclusion that she was not bound by this document—that notwithstanding it she held her own holding on the old terms, and that, as to the 10 added acres, there was no express contract of any kind, although of course the tenant was liable for their value

(1) [1894] 2 I. R. 590.

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in use and occupation. This is shown not merely by the language of the judgments, but by the fact that the originating notice was amended by striking out the 10 acres altogether. Indeed, Lord Justice FitzGibbon would have preferred the Court below to have dismissed the notice, on the ground that it asserted a tenancy that did not exist, and to have left the true case to be made in a new proceeding.

Is it possible to take this course in the present case? Can we believe that Mrs. Falkiner did not fully understand the terms of the agreement of 1891, and know that she was thereby entering into a new contract for a holding, different from any holding that had previously existed, and subject to a new rent? If we were now to accede to the request of Mr. Cherry, and amend the originating notice by confining it to the lands demised in 1846, at the rent of £2 17*s.* 2*d.*, it would amount to a decision that the rent of £14 was wrongfully paid and received for twelve years.

It is said that Mrs. Falkiner was not aware that the effect of taking the new letting would be to deprive her of any rights which she might otherwise have had under the Land Acts in her old holdings. I assume that this was so, although the circumstance that she refused to take a lease for her own life does not prove it, inasmuch as a preference for a tenancy from year to year to any term created by lease existed in the north of Ireland long before 1881. But her ignorance on this point is immaterial. If the law attaches a legal consequence to a contract entered into and acted on for years, it cannot be set aside on the ground that either of the parties was not aware of such consequence. To hold otherwise would be to introduce an element of confusion and uncertainty into contractual relations for which there is no precedent. I do not understand that Meredith, J., decided the case on this ground. On the contrary, his *ratio decidendi* was not relied on in this Court by the tenant's counsel. He seems to have held that what happened in 1891 was a demand of an increase of rent from the tenant of a present tenancy, and an acceptance by the tenant of such increase. There is some authority on which, recognised as it seems to be by section 4 of the Act of 1881, I would be prepared to act, that the mere increase or decrease of the rent of a holding does not create a new tenancy therein; but

it would be pushing this proposition to an absurdity to apply it to a case like the present. There was here not merely a new rent, but a new holding, and on both authority and principle this constitutes a new tenancy. Mr. Healy dwelt on the hardship which this view of the law would inflict on his client. This is a bad argument under any circumstances, and especially so in cases under the Irish Land Acts, in which it is generally impossible to say on which side the hardship lies. As long as the tenant resided in the holding Colonel Thomson did nothing to disturb her; but after her second marriage she went to live on her husband's premises, and the landlord may then have had reasonable grounds for seeking to recover possession.

Solicitor for the appellant: *R. E. Bailie.*
Solicitors for the respondent: *Corr & O'Connor.*

R. D. M.

IN THE MATTER OF THE ESTATE OF R. P. WALTERS, H. J. GREENWOOD, AND CAPTAIN H. FRENCH.

Land Purchase Acts—Irish Land Act, 1903—*Estate—Lands held by a rural district council under a statutory letting, which are wholly sublet—Jurisdiction of the Estates Commissioners.*

There is no power under the Irish Land Act, 1903, or any of the Land Purchase Acts, to advance money for the purchase of labourers' plots either to a rural district council or to a weekly tenant.

Where, on an estate proposed to be sold by the vendors to the tenants direct, under the Irish Land Act, 1903, there were certain lands held by a rural district council, under a statutory letting, which were wholly sublet to a weekly tenant, and where it was proposed to sell the said lands to the rural district council, on a question arising as to the jurisdiction of the Estates Commissioners in the matter:—

Held, that the Estates Commissioners had jurisdiction to include the said lands in the estate, and to make a vesting order vesting the same in the rural district council, provided the purchase-money agreed upon was paid in cash by the rural district council to the credit of the matter.

Meredith, J. 1905.

In re WALTERS' ESTATE.

QUESTIONS submitted by the Estates Commissioners to the Judicial Commissioner for his decision, under section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—The Rural District Council of Celbridge (No. 2) held 2 roods, portion of the lands of Hynestown, part of the lands proposed to be sold by the vendors to the tenants direct in this estate, under a statutory letting, under the Labourers (Ir.) Act, at the annual rent of 17*s.*, fixed by order dated 24th June, 1887. The premises were wholly sublet to Julia Weldon, at the rent of 2*s.*, payable weekly. The vendors had entered into an agreement, dated 17th February, 1905, to sell the said premises to the rural district council for the sum of £16. It was proposed that this sum should be paid by the rural district council in cash to the credit of the matter, and that the Land Commission should execute a vesting order, vesting the premises in them. The Estates Commissioners were prepared to adopt this course, and to include the premises in the estate, provided the Judicial Commissioner was of opinion that they had jurisdiction to make a vesting order, as proposed.

The following question was submitted:—Could the premises above referred to be included in the estate, and an order be made vesting the same in the rural district council?

Brunskill, for the vendors.

Cur. adv. vult.

July 31.

MEREDITH, J.:—

I am quite clear that if it were not for the proposal by the rural district council to pay in cash to the credit of the matter the amount for which the vendors have agreed to sell the labourers' plots, it would be impossible to carry out the transaction in the way suggested. There is no power under the Act of 1903, or under any of the Land Purchase Acts, to advance money for the purchase of these labourers' plots either to the rural district council or to the weekly tenant. It is quite clear that a weekly tenant is not a tenant who is entitled to an advance. It is equally clear that the Estates Commissioners cannot buy out the rural district

council as owners of the middle interest. Accordingly, if it were not for this agreement to sell for cash, and to pay cash to the credit of the matter, I would be obliged to answer the question submitted to me in the negative. But, having regard to the wide powers of the Estates Commissioners with regard to the definition of an estate and the inclusion of premises in an estate, I think it is possible for the Estates Commissioners to include in the estate before them the premises that have been acquired by the rural district council under the Labourers Acts. The difficulty, then, as to advancing money either to the rural district council or to the weekly tenants having been got over by the payment of cash into Court, I think it is within the powers of the Estates Commissioners, under the statute, to vest the plots in the rural district council. It is quite obvious that it would be a case of hardship on the landlord and on the rural district council, where they are both agreed that plots of this description should be included in the estate, and cash paid by the purchaser, that the Estates Commissioners should be compelled to exclude the plots from the ambit of the estate, and therefore leave the landlord in the position of having to collect very small rents, here and there, from the rural district council; or, on the other hand, that the rural district council should be forced to borrow money under the Labourers Acts, and to obtain a conveyance from the landlord, all of which would mean expense and a second investigation of title. Where the title has been fully investigated by the Land Commission it would appear to be a waste of money if the matter could not be carried out in the manner suggested in the question. I, accordingly, answer the question in the affirmative. If they pay in cash—and only if they pay in cash—the rural district council can get a vesting order. I have no power to award costs in connection with questions submitted to me under section 23; but I have full power to say, as I do say, that the owner is entitled, as part of his costs in the matter, to the costs of the argument.

Solicitors for the vendor: *Collis & Ward.*

W. C. S.

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30.
Dec. 7.

O'CONNOR *v.* FOLEY (1).

Landlord and tenant—Statutory covenant against assignment—7 Geo. 4, c. 29—Assignment without consent of landlord—Statute of Limitations, effect of—Covenant for further assurance—Statutory tenancy—Graft.

By lease, dated the 5th October, 1827, E. V. demised to J. S. the lands of A. for three lives or thirty-one years. By indenture, dated the 25th January, 1855, E. J. S. (in whom the lessee's interest was vested) assigned the lands to O., the consent of the lessor not having been obtained. O., having entered, continued in possession until the 7th December, 1888, when he obtained an order fixing a fair rent for the holding, making the holding a present tenancy. On the 30th September, 1876, O., on the occasion of the marriage of his son, H. H. O., assigned the lands to trustees on trust for himself for life, then for H. H. O. for life, with an ultimate trust (in the events which happened) for the children of H. H. O. in equal shares. The deed contained a covenant by O. for further assurance. H. H. O. died in 1881 and his wife in 1882, leaving three children, the plaintiffs, who were then minors. In September, 1888, O., on the marriage of his daughter with the defendant F., and in consideration of £300, agreed to assign the lands to F. and his wife, subject to the landlord's consent, which was obtained in January, 1889. The defendants had notice of the settlement of 1876. O. died in 1896, the plaintiffs being still minors. In an action to carry out the trusts of the settlement of the 30th September, 1876:—

Held, that O., by getting a fair rent fixed, was estopped from denying that he was assignee of the lease; that the conversion of the lease into a statutory tenancy in 1888 put an end to the applicability of the Act of 7 Geo. 4, c. 29; that whatever interest in the lands was vested in the defendants was bound by the trusts of the settlement of 1876, of which the defendants had notice; and that O.'s covenant for further assurance bound him, on obtaining the statutory tenancy in 1888, to give effect to the trusts of the settlement of 1876, provided the legal tenancy was dealt with in the manner provided by the Land Acts.

Decision of the Master of the Rolls affirmed.

By lease, dated the 5th October, 1827, Edward Villiers demised to John Synan, his heirs, executors, administrators, and assigns, the lands of Ardmonick and Knockea in the county of Limerick,

(1) In the Court of Appeal, before FitzGibbon, Walker, and Holmes, L.JJ.

for three lives and thirty-one years, to be computed from the 1st May, 1827, subject to the yearly rent of £250. The date of the lease brought it within the statute 7 Geo. 4, c. 29.

By indorsement on this lease, dated the 25th January, 1855, Edward John Synan (in whom the estate and interest of the lessee had become vested) assigned the lands to Hugh O'Connor in consideration of £300. The consent of the lessor was not obtained to this assignment.

By a settlement, dated the 30th September, 1876, executed on the marriage of Hugh Henry O'Connor (son of Hugh O'Connor) and Mary Fennelly, Hugh O'Connor assigned the lands to Robert Frewen and Daniel Quilty, upon trust for himself for life; then for Hugh Henry O'Connor for life; then for Mary Fennelly for life; and after the death of the survivor in trust (in the events which occurred) for the children of the marriage in equal shares, if sons, on attaining twenty-one, and if daughters, on attaining that age, or marrying under it. By this settlement Hugh O'Connor covenanted for title, against incumbrances, and for further assurance.

Hugh Henry O'Connor died on the 6th August, 1881, and Mary O'Connor, his wife, died in 1882, leaving three children, the plaintiffs, all of whom were then minors.

On the 7th December, 1888, Hugh O'Connor obtained an order under the Land Law Act, 1887, fixing a fair rent for the holding.

In 1889, Lucy O'Connor, daughter of Hugh O'Connor, married Patrick Foley, and by an agreement, dated the 19th September, 1888, it was agreed that, in consideration of the marriage, and of a sum of £300, the property of Patrick Foley (which was applied to clear the rent of Knockea, then under eviction), the lands were to be assigned to Patrick and Lucy Foley, subject to the landlord's consent. No actual assignment to the Foleys was ever executed. The consent of the landlord was obtained in January, 1889.

Hugh O'Connor died in 1896, and after his death the plaintiffs continued to live on the farm with the Foleys. The Foleys, having become heavily in debt, induced the plaintiffs, just after the two eldest came of age, to join them in a mortgage of the lands to secure the debt, and in promissory notes. The action was brought by the

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three O'Connors to have the trusts of the settlement of the 30th September, 1876, carried into execution, and for an account of the property subject to the trusts of the settlement, and also to set aside the mortgage obtained by the defendants, and the promissory notes. On the 19th March, Porter, M.R., delivered judgment by which he set aside the deed; he declared the plaintiffs not liable on the promissory notes, and he directed the trusts of the deed of the 30th September, 1876, to be carried into execution, and that the defendants, Patrick and Lucy Foly, should account for the rents and profits of the lands since the death of Hugh O'Connor. See the case reported [1905] 1 I. R. 1. The defendants appealed from the latter part of this decree.

Charles Doyle, for the appellants:—

The settlement of the 30th September, 1876, was void by the terms of sect. 3 of 7 Geo. 4, c. 29: *Meares* v. *Redmond* (1). The covenant for further assurance falls with the deed: *Doody* v. *Nolan* (2); *Re Turpin and Ahern's Contract* (3).

Hugh O'Connor acquired the lessee's interest by the Statute of Limitations, and the title so acquired under the statute is the same as if the interest were conveyed to him, and all the incidents of tenancy and covenants bind the title so acquired: *Rankin* v. *M'Murtry* (4); *Mulcaire* v. *Lane-Joynt* (5); *Molony* v. *Molony* (6); *M'Cormack* v. *Courteney* (7); *Re Hayden* (8). In *Tichborne* v. *Weir* (9) the English Court of Appeal decided that if a person acquires a title to a lessee's interest under the Statute of Limitations, that operates by extinguishing the prior interest, and not by transferring it. None of the Irish cases were cited; but the title acquired by adverse possession is not paramount to, and does not destroy, the right of persons entitled to the benefit of restrictive covenants to enforce them against the land: *Re Nisbet* v. *Potts' Contract* (10). The agreement to assign to the Foleys, being made with the assent of the landlord, must prevail.

(1) 4 L. R. Ir. 533.
(2) 2 L. R. Ir. 199.
(3) [1905] 2 I. R. 85.
(4) 24 L. R. Ir. 290.
(5) 32 L. R. Ir. 683.
(6) [1894] 2 I. R. 1.
(7) [1895] 2 I. R. 97.
(8) [1904] 1 I. R. 1.
(9) 67 L. T. (N. S.) 735.
(10) [1905] 1 Ch. 391.

O'Connor, K.C., *Moriarty, K.C.*, and *Carrigan*, for the respondents:—

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A person in possession of land has a property with which he may deal by deed, or by will, against anyone except the true owner: *Asher* v. *Whitlock* (1). Even if the settlement of 1876 was void under the statutory covenant against assignment, that does not affect the covenant for further assurance. That covenant would bind any interest which Hugh O'Connor acquired in the land. One of the objects of the covenant for further assurance is that a man may be making a conveyance of a bad title, and then he covenants that if he gets a better title, he will convey it: Sugden's Vendors and Purchasers (14th ed.), 612. *Doody* v. *Nolan* (2), when rightly interpreted, did not decide that a covenant for further assurance was a dependent covenant. It is an independent covenant, if it is a covenant to do something which the law allows to be done; it would be otherwise if it was a covenant to do that which is illegal. *Tichborne* v. *Weir* (3) decided that the effect of the Statute of Limitations was to extinguish the right of the lessee, and not to transfer his estate to the party in possession.

FITZ GIBBON, L.J.:— Dec. 7.

This case raises difficult and important questions upon the Acts against assignment and sub-letting, the operation of the Statute of Limitations, and the attachment of equitable claims upon Statutory Tenancies.

The plaintiffs are the three sons of Hugh Henry O'Connor; the defendant, Lucy Foley, is his sister, and the defendant, Patrick Foley, is her husband.

The object of the suit is to execute the trusts of an indenture of settlement, dated September 30, 1876, made on the marriage of Hugh Henry O'Connor, and to establish under that settlement an equitable title claimed by the plaintiffs to certain lands demised by a lease of October 5, 1827, to one John Synan for three lives, and a concurrent term of thirty-one years. The leasehold was converted in 1888 into a Statutory Tenancy which is still subsisting, and the

(1) L. R. 1 Q. B. 1. (2) 2 L. R. Ir. 199. (3) 67 L. T. (N. S.) 735.

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Foleys are in possession of the lands. Subsidiary relief is also sought, to set aside an agreement of June 26, 1901, and a deed of August 1, 1901, by which Patrick Foley assigned, and the plaintiffs purported to confirm, the lands to Lucy Foley.

The Master of the Rolls by the decree under appeal granted the relief sought. Having regard to the relations between the Foleys and the plaintiffs, and the other circumstances proved, the agreement and deed of 1901 were most justly declared fraudulent and void, and I shall not further refer to them.

The appeal has been taken upon the ground that the plaintiffs have no title to maintain the action in respect of the lands. Upon this point, the material facts and dates are as follows:—

The Act 7 Geo. 4, c. 29, section 3, applied to the lease of 1827, and made every deed or instrument whereby the lessee purported to assign the lands without the lessor's written consent "wholly void and invalid to all intents and purposes whatsoever."

On January 25, 1855, Edward John Synan, described as the assignee of the estate and interest of John Synan the lessee, assigned the lease, without the consent of the lessor, to Hugh O'Connor for £300.

Hugh O'Connor was the father of Hugh Henry O'Connor and of Lucy Foley, and the grandfather of the plaintiffs. He entered into possession under the void assignment of 1855, and continued therein, paying the rent reserved by the lease of 1827, until December 7, 1888, when he obtained an order as lessee under the Land Acts, 1881 and 1887, fixed a Fair Rent of £171 15*s.*, and made the holding a "present tenancy" in his own name.

On September 30, 1876, after Hugh O'Connor had been in possession for more than twenty years, he executed the settlement under which the plaintiffs claim. It recites the lease of 1827, that the premises became vested in Edward John Synan, and the assignment from Synan to O'Connor, *habendum* for the residue of the term subject to the rent and performance of the lessee's covenants in the lease; it recites an agreement in consideration of £700, the marriage portion of the intended wife, to be paid to Hugh O'Connor, that he should assign the lands to trustees, Frewen and Quilty, upon the trusts of the settlement. It purported to assign the lands accordingly on trust to permit Hugh

O'Connor to occupy the same during his life, and after his death to permit and suffer Hugh Henry O'Connor to occupy the same until his death or bankruptcy, making certain provisions for his wife and mother, with an ultimate trust, in the events which happened, for all the children of Hugh Henry O'Connor in equal shares.

Hugh O'Connor covenanted to pay the rent during his life, and for title to make the settlement, and against incumbrances, and, lastly, he covenanted for himself, his executors, and administrators, when required by the trustees, to make, do, and execute all such further and other acts for the further, better, and more perfectly assigning the lands, and carrying out the intentions of the parties to the settlement, as counsel should advise.

Hugh Henry O'Connor and his wife died in 1881 and 1882, leaving their three children, the plaintiffs, then aged under six, five, and three, years respectively. They, with their aunt Lucy, continued to live with Hugh O'Connor, and in 1889 Lucy married Patrick Foley, who came to live with Hugh O'Connor on the lands. In September, 1888, Hugh O'Connor, in consideration of £300 brought in by Patrick Foley on his marriage, and applied in payment of rent, agreed to assign the lands to Patrick and Lucy Foley, subject to the landlord's consent, which was obtained in January, 1889, after the Fair Rent had been fixed by Hugh O'Connor, who continued to live on the lands until 1896, when he died, leaving the plaintiffs all still minors. They thenceforth, when at home, lived with their aunt and uncle, and the youngest attained twenty-one on January 7, 1901.

There is ample evidence, and I find as a fact, that Lucy Foley and Patrick Foley had notice from the first of the settlement of 1876, and that they stood *in loco parentis* to the plaintiffs, during their minority; the plaintiffs were ignorant of their rights.

Under the Act of 1826 the assignment from Synan to O'Connor must be treated as void. The first important question is—What, if any, was the effect upon Hugh O'Connor's title, of the applicability of the Act to the lands, when he had remained in possession for twenty years, as he had done before he executed the settlement of September 30, 1876?

We have been pressed with the English decision in *Tichborne*

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v. *Weir* (1) as an authority that the title acquired by Hugh O'Connor under the Statute of Limitations was freed from the operation of the statute of 1826, and that the provision, covenants, and conditions of the lease no longer affected his powers of disposition.

Such a result might produce far-reaching effects in Ireland. I do not question the authority of *Tichborne* v. *Weir* (1). It is the decision of three eminent Judges on Appeal; it appears never to have been questioned in any text-book or subsequent case, and I respectfully say that it seems to me to be right. But, in my opinion, its effect extends only to liability *in contract*, and it does not affect the case now before us. It appears to me to decide only this—that the Statute of Limitations operates by way of extinguishment, and not by way of assignment of the estate, which is barred; and that a person who becomes entitled to a leasehold interest by adverse possession for the prescribed period is not liable to be sued *in covenant as assignee* of the lease, unless he has estopped himself from denying that he is assignee.

Lord St. Leonards, in *Incorporated Society* v. *Richards* (2) and *Scott* v. *Nixon* (3), had spoken of the statute as executing a conveyance, or operating as a statutory transfer. Lord Wensleydale in *Doe* v. *Sumner* (4) had described the effect of the Act as making "a parliamentary conveyance of the land." When applied to the fee these expressions, though metaphorical, are practically correct. But they have since been quoted in several Irish cases, and applied literally to limited estates, and in particular to tenancies, and I am not prepared to uphold *dicta* in which they so appear against the decision of the Court of Appeal in *Tichborne* v. *Weir* (1) that, though a right is extinguished, and a right is given, *there is not a transfer of a right*, by possession for the statutory period. As Bowen, L.J., says—

> "The effect of the Act is not only to bar the remedy, but also to extinguish the title of the person out of possession, and in that sense the person in possession holds by virtue of the Act, but not by *a fiction of a transfer of title*."

(1) 67 L. T. (N. S.) 735.
(2) 1 Dr. & War. 258.
(3) 3 Dr. & War. 388.
(4) 14 M. & W. 39.

It is plain from the judgments in *Tichborne's Case* (1) that although the defendant was held not to be liable *in covenant*, the quantity, quality, and incidents of the landlord's estate in the lands were assumed to be the same as against the defendant as they had been against the lessee. Furthermore, it was expressly conceded that the occupier could be sued in covenant either if he had taken the lease by assignment, or if he had estopped himself from denying that he was assignee.

For three reasons, at least, I think that *Tichborne's Case* (1), rightly understood, does not apply here.

1. Hugh O'Connor took an assignment by deed of the lease. Though that assignment was void under the Act of 1826, he paid the reserved rent, and he remained in possession as lessee until, on Dec. 7, 1888, he converted the leasehold into a Statutory Tenancy from year to year under the Land Acts of 1881 and 1887, and thereby acquired a tenancy which he could not acquire in any other capacity than that of a lessee in occupation. I, therefore, think that he was estopped from denying that he was lessee when he got that tenancy.

2. Deasy's Act, section 3, founds the relation of landlord and tenant in Ireland upon the express or implied contract of the parties, and, as at present advised, I think that possession of a tenancy, when acquired under the Statute of Limitations, carries with it terms of *tenancy*—as distinguished from terms of *personal contract*—the same as those on which the barred tenant held, and that, in Ireland, those terms are founded on *contract*.

3. In my opinion the effect of the statute of 1826, in making assignment without consent illegal, is independent of contract; it is a statutory incident of the tenancy, and a person who acquires a right under the Statute of Limitations to hold lands against a barred lessee must hold them as between himself and the landlord, and as regards the law, subject to the same incident of inalienability without consent, which affected them in the hands of the lessee.

But, whether any or all of these reasons are sufficient, I am of opinion, and I assume, that the assignment which Hugh O'Connor purported to make by the settlement of 1876, though made under

(1) 67 L. T. (N. S.) 735.

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a title acquired by twenty years' possession, was as void as if Hugh O'Connor had been a legal assignee of the lease, and accordingly *Tichborne* v. *Weir* (1) is out of the case.

The conversion of the leasehold into a Statutory Tenancy in 1888 put an end to the applicability of the Act of 1826 to the lands. It has been decided, and it has been treated at the Bar as now settled, that the effect of fixing a Fair Rent upon a leasehold under the Acts of 1881 and 1887 is to substitute the restrictions of the Land Acts for the prohibition of assignment under the Act of 1826. Therefore, from and after the fair-rent order, Hugh O'Connor became entitled to sell and assign his tenancy in the lands, provided he did so in the manner prescribed by the Land Act.

Up to that time he was in possession of the land on the terms of the lease. One of the lives was still in being in 1888, and may be so still, but another effect of the creation of the statutory tenancy from year to year was to put an end to the estate *pur autre vie*, and, irrespective of special occupancy, the yearly tenancy which then vested in Hugh O'Connor, would pass on his death to his personal representative, subject to any other obligations binding him.

No personal representative to Hugh O'Connor has been raised, but if the legal tenancy remained vested in him until his death, any one of his grandsons, on taking out administration, would become the legal tenant in succession.

Hugh O'Connor purported to mortgage the lands in 1873, and the Master of the Rolls has held that in 1888 he made "a good, equitable contract for a transfer to Patrick and Lucy Foley, so far as he was in a position to make one, subject to the landlord's assent, which was obtained in January, 1889." No actual assignment was executed, but the Foleys have since remained in possession, subject to a transaction with the Munster and Leinster Bank in 1894, with which we have not been asked to deal, and to the instruments of 1901, which have been set aside against the Foleys and the defendant Fitt, who claims through them.

The legal estate in the tenancy is not shown to be vested in the

(1) 67 L. T. (N. S.) 735.

Foleys, no assignment to them being proved. It may be outstanding until personal representation is obtained to Hugh O'Connor. It may be in a mortgagee. But whatever estate and interest, legal or equitable, is now vested in the Foleys or in Fitt, is, in my opinion, bound by the trusts of the settlement of 1876, having been acquired with notice of that settlement.

The only remaining question is whether those trusts now bind the Statutory Tenancy, so far as it belongs to the Foleys or any one claiming through them. In my opinion, they do. It is impossible to contend that trusts and equities created by contract for value do not bind Statutory Tenancies under the Land Acts. Such a proposition would amount to a statutable license to commit fraud with impunity. Though the Act of 1826 invalidated the assignment to the trustees of the settlement, so long as the lease of 1827 was in existence, Hugh O'Connor's covenant for further assurance—framed in unusually comprehensive terms—bound him, on obtaining the Statutory Tenancy in 1888, to "feed his covenant," and carry out the intentions of the parties to the settlement, so far as he could lawfully do so, by assuring the tenancy upon the trusts declared by the settlement, in the manner in which the Land Acts enabled him to do so. The plaintiffs, being within the consideration of the settlement, are entitled to enforce the trusts, provided the legal tenancy, as against the landlord, is dealt with consistently with the Land Acts.

It has been contended that *Doody* v. *Nolan* (1) is an authority for avoiding the covenant as well as the assignment. In my opinion, this is not so. Even if the covenant could not have been enforced while the lease lasted, it fulfilled its proper function by binding the covenantor to settle the new interest which he acquired in 1888, and *Doody* v. *Nolan* (1) had nothing to do with that. But some observations which we made in *Turpin and Ahern's Contract* (2) have been quoted as avoiding the covenant entirely. In that case Walker, L.J., and I upheld the decision of the Master of the Rolls. I said, and I am still prepared to say, that a covenant to do an illegal act could not, in my opinion, create any equity in favour of the covenantee. There can be no equity to an illegality.

(1) 2 L. R. Ir. 199. (2) [1905] 1 I. R. 98.

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Doody v. *Nolan* (1) decided that where the act which the covenantor undertook to perform would, if performed, be a breach of the statute, the covenant was void. But I expressly said that, though an assignment or the creation of an estate contrary to a covenant against alienation was void, it was possible to establish beneficial rights against property held under leases containing covenants against alienation, and that, notwithstanding a covenant against alienation, equities and beneficial rights against the land might be created. So far, I adhere to what I said.

But the judgment of the Master of the Rolls in *Turpin and Ahern's Case* (2) referred to his decision in the present case, and I said that I found it impossible to reconcile a decision that a covenant could create an equitable estate with *Doody* v. *Nolan* (1). When saying this, I knew nothing about the facts of this case, and I was thinking only of an estate *as assignee*; if my observation goes beyond that, I must now qualify it, and limit it to the creation of an estate *by assignment contrary to the statute.* Beyond that, I have got over the "impossibility" now. All the judgments in *Doody* v. *Nolan* (1) are consistent with the creation of equitable rights and interests by way of trust, and by means of contractual obligation binding conscience, and the Chief Justice expressly recognises covenants for title and for further assurance as capable of affecting lands to which the statutes against assignment apply.

But whether Hugh O'Connor and those claiming through him could, or could not, have been compelled to hold the leasehold upon the trusts of the settlement, while the lease lasted, when in 1888 he obtained an estate to which the Act of 1826 did not apply, he became able—and therefore bound—to give effect to the trusts against the legal tenancy, by dealing with it as permitted by the Land Acts.

For these reasons, the interest of the Foleys and Fitt in the Statutory Tenancy, being a graft upon the leasehold, is now bound in equity by the trusts of the settlement, and the judgment of the Master of the Rolls is in substance right.

In form, we think it advisable to vary it. It should first declare that any estate and interest in the lands which is now held

(1) 2 L. R. Ir. 199. (2) [1905] 1 I. R. 85.

by the defendants Lucy and Patrick Foley and Fitt, or by any person claiming through them, was acquired with notice of the settlement, and is now subject to the trusts thereof—viz. in trust —in the events which have happened—for the plaintiffs in equal shares.

Having regard to the circumstances of the parties, the account prayed against the defendants as bailiffs from the death of Hugh O'Connor could produce no money for the plaintiffs, and it would be oppressive and possibly unjust to the defendants, as, during a long period, they made considerable outlay upon the lands, and also to some extent provided for the plaintiffs. But Lucy and Patrick Foley must account for the rents and profits, over and above just credits and allowances, from the commencement of the action, and the Receiver, who has already been appointed over the lands, must be extended for the protection of the plaintiffs' interest. This will make an injunction unnecessary. We must declare the plaintiffs entitled to have the estate and interest of Hugh O'Connor and of the defendants Lucy and Patrick Foley and Fitt assured by a proper instrument consistently with the Land Acts upon trust for the plaintiffs in equal shares as beneficial owners in equity, and the defendants will be ordered to execute such an assurance when tendered by the plaintiffs.

The plaintiffs can arrange, by taking out representation to their father or otherwise, and on communicating with the landlord, for the preparation of an instrument which will vest the legal tenancy in accordance with the Land Acts in one of themselves or in a suitable trustee, upon trust for all three in equal shares. Possibly the landlord may consent to a sub-division. Our order will give the plaintiffs liberty to take all steps necessary for the preparation of a proper assurance, and we will remit the case to the Court of the Master of the Rolls to proceed thereon as to justice may appertain. The instrument required can be settled at Chambers, in case of difficulty or of difference between the parties, and all parties will have liberty to apply generally as occasion may require.

The order of the Master of the Rolls stands as to the costs hitherto incurred before him: the appellants must pay the costs of

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the appeal, and the subsequent costs will be reserved for the Rolls.

Walker, L.J.:—

The decision of the Master of the Rolls, so far as it is conversant with the right to set aside the deeds complained of, if the plaintiffs have a title to maintain the action, is, in my opinion, quite right. Those deeds are open to every infirmity which can be alleged as grounds of impeachment. The ages of the parties complaining—the relations that existed between them and the parties taking benefits under the deed—the position of indebtedness into which the plaintiffs had got through the action of the defendants—and the absolute ignorance of the plaintiffs as to the rights which the deeds deal with—made the defence of the deeds upon the merits a hopeless one, and an appeal would have been equally hopeless if the title of the plaintiffs had been free from the difficulties which attach to it.

But the questions arising upon that title are serious, and what we have to consider is whether the difficulties attaching to it have been removed or answered.

The property is held under a lease for lives of 1827, and, having regard to its duration, and date, and terms, a public Act of Parliament, 7 Geo. 4, c. 29, applies, which prohibits the assignment of such a property by the lessee or tenant, his heirs, executors, administrators, or assigns, without the specified consent, and makes every deed or instrument whereby assignment is attempted wholly void and invalid.

The title of the plaintiffs is derived under a settlement, dated 30th September, 1876, made by Hugh O'Connor, on the marriage of his son Hugh Henry O'Connor with Mary Fennelly. This settlement recites the lease and its vesting in Edward J. Synan, son of the lessee, and an assignment from Synan to Hugh O'Connor; and Hugh O'Connor then purports to assign the lands to two trustees—Robert Frewen and David Quilty—upon trust for himself for life, then for Hugh Henry O'Connor for life, then for Mary Fennelly for life, and after the death of the survivor of husband and wife, in trust for the children of the marriage in such shares as the survivor of husband and wife should appoint, and in

default of appointment in trust for all the children in equal shares, if sons at twenty-one, and daughters at twenty-one or marriage. By this settlement Hugh O'Connor covenanted for title and further assurance. The plaintiffs are the three children of the marriage, who survived their father and mother; but the settlor, Hugh, did not die till 1896, and then the title of the plaintiffs would have accrued beneficially in possession if this title had been free from difficulties created by the 7 Geo. 4, c. 29, and intervening deeds executed by Hugh O'Connor.

The first answer on behalf of the plaintiffs to the difficulty created by the 7 Geo. 4, c. 29, is that in 1875 Hugh O'Connor had, by possession for twenty years, acquired a title under the Statute of Limitations to the leasehold interest, and thenceforward the statutory disability to assign ceased, and he was competent to make the assignment on trust on 30th September, 1876. This contention, which found favour with the Master of the Rolls, is founded upon the decision in *Tichborne* v. *Weir* (1) in the Court of Appeal in England, pronounced by three Judges of the greatest eminence. The defendant was sued on a covenant to repair contained in a lease which had expired by effluxion of time. He had been over twenty years in possession while the term lasted, paying rent to the landlord; and it was held that the effect of the Statute of Limitations was to extinguish the title of the lessee, the original occupier, but that it did not vest the lease in the defendant by way of transfer of the term, and therefore that he was not liable on a covenant running with the land; and further, as all the defendant had done was to pay the rent, he was not estopped from disputing that he was assignee. There is great force in the reasoning of the learned Judges in the case, notwithstanding expressions to be found in the judgments of some other eminent Judges speaking of the statute operating by way of transfer or conveyance, that it operates only by way of conclusion against the lessee twenty years (twelve years now) in possession, that the person dispossessed had no title; but I do not think the question material in the present case, because I do not see how Hugh O'Connor could ever allege that he had not acquired the term and occupied as lessee, see-

(1) 67 L. T. (N. S.) 735.

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ing that on the 7th December, 1888, he, by virtue of his title as lessee and successor in title to the tenant, fixed a fair rent against his landlord, and made himself a tenant from year to year with an adjusted rent, subject to statutory conditions and all the conditions in his lease not inconsistent with a yearly tenancy. Further, I much doubt if in any event the disability to assign created by a public statute would not, as a paramount disability, survive the twenty years and attach to the lease, on the principles applied by Farwell, J., in *Nisbet & Potts* (1). I shall assume for the purposes of my judgment that the assignment to the trustees, Frewen and Quilty, was void, but as I shall mention hereafter, I do not think this invalidated the equitable trusts in favour of the plaintiffs when they arose on the death of Hugh O'Connor in 1896.

The next contention put forward for the plaintiffs was that as Hugh O'Connor fixed a fair rent on the 7th December, 1888, and had entered as he did into a covenant for further assurance by the settlement, the interest in the lease could, after the 7th December, 1888, be validly assigned by him as in that settlement, and the covenant for further assurance then attached to it, and became operative in equity to bind the lands, and was a prior equity to the defendant's title, which was itself only equitable. I agree that after the 7th December, 1888, Hugh O'Connor could deal with the leasehold in any manner in which a statutory tenant could deal with his tenancy under the Act of 1881 ; but he could not assign to two persons, nor, having regard to the 19th section of the Act of 1896, convey by way of settlement to two persons as trustees; but if the plaintiffs had equitable interests in the lands, I am disposed to think that it was, and is, competent for the three equitable owners to assign their equitable interest to one of themselves, say, to the eldest brother or some other as trustee, and then, under the covenant for further assurance, compel the assignment to that one person on trust. But no title by this means has been either sought or acquired.

I do not think the covenant for further assurance was unlawful and void because the conveyance in which it is found was unlawful

(1) [1905] 1 Ch. 391.

and void, and in my opinion the case relied on of *Doody* v. *Nolan* (1) when examined does not support such a view. The covenant there was to deliver the possession of the lands to trustees free from incumbrances; and Chief Justice May distinguishes such a covenant from a covenant for title. A covenant for further assurance is only of value in, and it is designed to meet, the case of a defective title or of no title at all having been given, and the vendor subsequently, even for valuable consideration, acquires a good title or some interest which he can convey. If, and whenever, he can, the covenant for further assurance binds him to perfect the title he has given, and the right may be enforced against the vendor's representatives and persons claiming under him, even for valuable consideration with notice.

I wish to mention that there is an observation of my own in *Turpin and Ahern's Contract* (2) which goes too far. It was not necessary for my decision, but I said—"I admit, having regard to *Doody* v. *Nolan* (1), that an action at law would not lie for breach of a covenant for title contained in a void assignment." This, taken literally, is not correct. The particular covenant sought to be enforced must be had regard to; and, therefore, in this case I think the plaintiffs are entitled to rely on the covenant for further assurance to any extent its enforcement will avail them against Hugh O'Connor, and all claiming under him with notice, including the appellants, who plainly had notice of this settlement. I have indicated already one instance in which it might serve them.

But, in my opinion, the plaintiffs have a title to maintain this action irrespective of anything decided in *Tichborne* v. *Weir* (3), and even assuming that Hugh O'Connor was, on the 30th September, 1876, under the disability created by the 7 Geo. 4, c. 29. The conveyance to the two trustees, Frewen and Quilty, was unlawful and void, and nothing passed to them; but the conveyance was on trust, in the events that happened, for the plaintiffs, and that trust bound Hugh O'Connor. The estate remained in him, but subject to the trusts which he had created, which attached upon his conscience, and equitably bound the lands in his owner-

(1) 2 L. R. Ir. 193. (2) [1895] 1 I. R. 105. (3) 67 L. T. (N. S.) 735.

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ship: his heir-at-law would be equally bound, and one of the plaintiffs fills that character, and so would anyone claiming under him with notice, and the appellants had full notice, and I think the plaintiffs had a right to institute an action to set aside deeds which affected their title if they were obtained under circumstances which in this Court will invalidate them.

I am not clear on the documents I have seen that any legal estate passed by any deed to the appellants; but if there did, I think the appellants can be declared trustees for the plaintiffs of any estate they acquired. The plaintiffs are entitled to have such a declaration made, and to have an account of the rents received, which in this case it will be proper to limit to the date of action brought.

I have seen and concur in the form of judgment proposed by Lord Justice FitzGibbon. I also think they are entitled to have the receiver appointed extended to protect their rights. I do not see my way to giving the injunction.

I think the appeal should be dismissed with costs.

Holmes, L.J.:—

I intend to confine my observations to the consideration of whether the plaintiffs had any title to the lands of Ardmonick and Knockea at the date of the documents impeached in the action. I do so, because I agree in the view of these documents taken by the Master of the Rolls, and I am unable to add anything of value to his clear and convincing judgment on this branch of the case. His decision thereon, however, would be of little value to the plaintiffs unless they have some interest in the lands; and this depends upon two somewhat difficult questions of law arising from the following facts.

The lands in question were demised by lease of the 5th October, 1827, to John Synan, for the lives of the three persons therein named. At the date of the lease there was in force the statute 7 Geo. 4, c. 29, which enacted, in section 3, that where lands are held by virtue of a lease executed after the 1st June, 1826, not containing a clause expressly authorising the lessee to assign, it shall not be lawful for such lessee, his executors, administrators, or assigns, to assign without the express consent of the lessor, testified where the assignment is by deed or

other written instrument, by his written endorsement on such deed or instrument, and every deed or instrument whereby such assignment shall be made without such consent shall be and be deemed wholly void and invalid to all intents and purposes whatsoever.

On 25th January, 1855, by endorsement on this lease, Edward John Synan, who I shall assume was the lawful assignee of the lessee, assigned the demised premises without the consent of the lessor to Hugh O'Connor, who thereupon went into possession. On the 30th September, 1876, Hugh O'Connor, on the occasion of the marriage of his son Hugh Henry O'Connor and Mary Fennelly, conveyed the premises to trustees to hold in trust for himself for life; then for Hugh Henry O'Connor for life; then for Mary Fennelly for life, and after the death of the survivor, in case a power of appointment was not executed (which event happened), for the children of the marriage in equal shares.

Hugh Henry O'Connor died in 1881; and his wife died in 1882; and the plaintiffs are their three surviving children. These children continued to live on the lands with their grandfather, Hugh O'Connor, who on the 19th September, 1888, before the marriage of his daughter Lucy with Patrick Foley, executed an agreement by which, in consideration of the marriage, and of a sum of £300, the husband's fortune, the demised premises were to be assigned to Patrick and Lucy, subject to the landlord's assent, which was obtained in January, 1889. In December, 1888, Hugh O'Connor had a fair rent fixed for the lands under the Land Law (Ireland) Acts, 1881 and 1887. It is admitted that if the settlement of 1876 is valid or effective, the plaintiffs became entitled to the statutory term on the death of their grandfather in 1896; but at that time the Foleys were living on the farm, paying the rent thereof, and were generally regarded as the tenants. In this state of circumstances it is argued on behalf of the defendants that the conveyance of the premises in 1855 to Hugh O'Connor was made, by the statute to which I have referred, void and illegal; that it was not even binding on the grantor by way of estoppel, inasmuch as he could himself, up to the time when the Statute of Limitations put an end to his title, have recovered possession from the grantee: *Gillman* v. *Murphy* (1); that at the end of twenty years O'Connor,

(1) I. R. 6 C. L. 34.

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by the operation of that statute, either became assignee of the lease, or the liabilities and disabilities of the lessee in relation to the lands attached to him; that therefore the settlement of 1876 was void and illegal, and that the agreement of 1888 on the marriage of the Foleys was a transfer in equity of O'Connor's interest.

To this argument the plaintiffs offer two answers. In the first place, it is said that the effect of the Statute of Limitations is misconceived; that O'Connor did not by means thereof become assignee of the lease; that the right or interest he acquired in the lands did not carry with it the liabilities or disabilities of the lessee, and that the statute of Geo. 4 did not apply to such right or interest. The authority relied on to support this proposition is the case of *Tichborne* v. *Weir* (1), decided some years ago in the English Court of Appeal. That was an action by a lessor for breach of a covenant to repair contained in the lease. The defendant had acquired by the Statute of Limitations a right to the possession of the demised premises as against the lessee, and it was argued that the rights and liabilities of the latter were transferred to him. It was held that this view of the effect of the statute is erroneous, and that the action did not lie. In the present case the disability to assign the leasehold premises arose from the statute of Geo. 4, and not from the provisions of the lease; but I am disposed to think that this makes no difference, inasmuch as it is the lessee, his executors, administrators, and assigns who are prohibited from assigning, and it follows from the reasoning in *Tichborne* v. *Weir* (1) that Hugh O'Connor was not an assignee, nor a person in an equivalent position.

Tichborne v. *Weir* (1) appears to have been accepted in England as a correct statement of the law; and, undoubtedly, it is a decision of high authority. Still it is inconsistent with the view taken years before by great English lawyers. Lord St. Leonards, on at least two occasions (*The Incorporated Society* v. *Richards* (2), and *Scott* v. *Nixon* (3)), laid down that the Statute executes a conveyance to the party whose possession is a bar. Lord Wensleydale describes the process as a parliamentary conveyance: *Doe* v.

(1) 67 L. T. (N. S.) 735. (2) 1 Dr. & War. 258. (3) 3 Dr. & War. 388.

Sumner (1). I have said on a former occasion that the reference to a conveyance is not happily conceived. I prefer to hold that, although there is not a direct transfer to the wrong-doer who has been in possession, yet the title gained by such possession is limited by rights yet remaining unextinguished, and is commensurate with the interest which the rightful owners lost by the operation of the statute, and has the same legal character. This opinion has been universally held in Ireland. It was adopted by three Judges of the Queen's Bench Division in *Rankin* v. *M'Murtry* (2), and by three Judges of this Court in *Mulcaire, Tenant*; *Lane Joynt, Landlord* (3), Lord Justice Walker using the old phrase "a parliamentary conveyance of the tenancy." The same view has been taken by Palles, C.B., in *M'Cormack* v. *Courtney* (4), and by Madden, J., in *In re Hayden* (5). The point is of frequent occurrence in civil bills brought under the title jurisdiction, and I should think that every circuit-going Judge has taken the law as laid down in the cases I have mentioned. The title of the occupier who pays the rent for small agricultural holdings in this country is generally dependent on the Statute of Limitations, for personal representatives in such cases are rarely raised, and even where the holding is transferred *inter vivos*, there is often no writing. A fair rent under the Irish Land Acts can only be fixed on the application of a tenant in occupation, and yet the cases in which the only title of the applicants to the tenancy is such as I have described may be counted by hundreds. I am unable to resist the steady current of Irish decision, and in spite of *Tichborne* v. *Weir* (6), I am obliged to hold that at the date of the settlement of 1876 Hugh O'Connor was subject to the same disability to assign as the original lessee, and that, therefore, the indenture of that year was void and illegal.

The plaintiffs, however, have a second answer. The indenture contained a covenant for further assurance, and it is argued that as the effect of the fair rent order of December, 1888, was to put an end to the disability to assign, Hugh O'Connor could then have given to the trustees of the settlement a good

(1) 14 M. & W. 39.
(2) 24 L. R. Ir. 290.
(3) 32 L. R. Ir. 683.
(4) [1895] 2 I. R. 97.
(5) [1904] 1 I. R. 1.
(6) 67 L. T. (N. S.) 735.

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title to the lands, and that the covenant for further assurance conferred on every person claiming under the settlement a right to have the assignment perfected. It is said that this right is tantamount to an equitable estate in the lands, which was not defeated by the agreement of September, 1888, on the marriage of the Foleys, inasmuch as the latter had notice of the settlement of 1876, and the agreement only became operative when the landlord gave his assent in January, 1889.

There are some difficulties to be overcome before I can accept this chain of reasoning. There has been, I think, an impression amongst Irish lawyers that the effect of the decision in *Doody* v. *Nolan* (1) is, that where an assignment is invalid by reason of its having been made in violation of a covenant to assign, the covenants for title and for further assurance contained in the instrument of assignment are invalid also. This question was referred to in *Re Turpin and Ahern's Contract* (2) recently before this Court; but as there was no evidence that the lost deed had contained such a covenant, and as the case was decided on other grounds, little consideration was given to it. Still the impression in the minds of all the Judges seems to have been in accordance with the view which I have attributed to Irish lawyers in general. Fitz Gibbon, L.J., found it impossible to reconcile a decision that a covenant for further assurance could create an equitable estate with *Doody* v. *Nolan* (1). I expressed myself to the same effect, and Walker, L.J., said, "I admit, having regard to *Doody* v. *Nolan* (1), that an action at law would not lie for breach of a covenant for title contained in a void assignment." I have now re-read the report of *Doody* v. *Nolan* (1) in the light of the arguments addressed to us in the present case, and I am disposed to think that the decision did not go so far as I have hitherto supposed. I think that all the Judges recognised that the covenants for title and for further assurance in an assignment rendered void by Deasy's Act may be valid; and as this is in accordance with my own opinion, I am prepared to so rule.

There is, however, another difficulty. It was assumed in the Court below, and during the greater part of the argument here,

(1) 2 L. R. Ir. 199. (2) [1905] 2 I. R. 85, 98.

that Hugh O'Connor, after his fair rent was fixed, could make good the assignment of the premises which he purported to make by the indenture of 1876, and that the necessity for obtaining the landlord's consent had disappeared. I am of opinion that this was not his position. The order fixing the fair rent substituted for the previous disabilities to assign the provisions of the Land Acts. By section 1 of the Act of 1881, except with the consent of the landlord, he could sell his tenancy to one person only. Section 19 of the Act of 1896 enables the tenant to assign to one person only by way of family settlement; but in the events that have happened three persons would now be entitled under the trusts of the indenture of 1876, if that deed were valid. He might, however, after having a fair rent fixed, have given the lands to one of these three in trust to pay a portion of the net rents and profits to the others, or he might have assigned them to a stranger subject to trusts of a similar nature. It is, I think, a difficult question whether, if the three children were now to agree to call on the personal representative of their grandfather, or other person in whom the legal estate in this tenancy is now vested, to assign the premises to a stranger, or to one of themselves, in trust for all of them, such representative would be bound to do so, either by reason of the covenant for further assurance, or by reason of a trust being attached to the lands, in the hands of Hugh O'Connor, during his tenancy. I am disposed to think, but not without considerable doubt, that the personal representative would be so bound, and in that case it would follow that the plaintiffs have sufficient interest in the lands to enable them to maintain this suit.

Solicitor for the plaintiff: *John O'Dwyer.*
Solicitor for the defendant: *F. M. Fitt.*

R. D. M.

Meredith, J. 1905. July 7, 27.

IN THE MATTER OF THE ESTATE OF THE SCOTTISH UNION AND NATIONAL INSURANCE CO.

Land Purchase Acts—Irish Land Act, 1903, *ss.* 1, 98—"*Separate estate*"—*Declaration—Jurisdiction of Estates Commissioners to refuse—Zones—Condition precedent to sale under the Act.*

In the case of a proposed sale, under the Irish Land Act, 1903, by a landlord to his tenants direct, the agreements were for the sale of judicial tenancies at prices coming within the zone limits mentioned in section 1 of the Act. On a question arising as to the jurisdiction of the Estates Commissioners to refuse to declare the lands comprised in the originating application a "separate estate" for the purposes of the Act, on the grounds—(1) that the security for the advances would be inadequate, and (2) that a number of the holdings were intermixed and in rundale:—

Held, that the Estates Commissioners had jurisdiction on these grounds to refuse to make the declaration.

Held, also, that the question of the zones did not affect their jurisdiction.

Semble: In proceedings for the sale of an estate under the Irish Land Act, 1903, the declaration made in the proper exercise of their discretion by the Estates Commissioners or the Congested Districts Board, as the case may be, that the lands proposed to be sold are fit to be regarded as a "separate estate" for the purposes of the Act, is a condition precedent to any definitive step being taken in such proceedings for sale.

QUESTIONS submitted to the Judicial Commissioner for his decision, under sect. 23 (1) of the Irish Land Act, 1903. From the memorandum of the Estates Commissioners the following facts appeared. An originating application had been filed, and agreements for sale direct by the landlord to the tenants had been lodged. The lands therein comprised were situated in the barony of Kiltartan, county of Galway, and in the barony of Burren and Corcomroe, and county of Clare. It appeared that the majority of the agreements were for the sale of judicial tenancies, and that in these cases the prices agreed upon came within the zones. The Commissioners had had before them the consideration of the question whether or not they should declare the lands comprised in the originating application fit to be regarded as a "separate

estate," for the purposes of the Act. In a memorandum, issued on January 19, 1905, the Commissioners stated that as to the portion of the property comprised in the originating application, situated in the county of Galway, and known as the "Kinvara Estate," it was manifest to them that the annuities on the advances asked for could not be duly paid, and that the making of the advances would inevitably result in loss to the ratepayers; that it was also manifest that the holdings were uneconomic, congested, intermixed, and in rundale, and that the boundaries were confused, and that to make the advances and vest the holdings in their present condition would be to perpetuate the existing congestion and confusion. For both these reasons, either of which was, in their opinion, sufficient, the Commissioners refused to declare the lands comprised in the originating application fit to be regarded as a separate estate.

In an affidavit filed on behalf of the owners, it was stated that the entire estate of the owners was included in the originating application, and that all the holdings thereon were agricultural or pastoral, and were all subject to judicial rents, fixed either by the Court or by agreement.

On the application of the owners, the Commissioners referred the following questions to the Judicial Commissioner for his decision:—

(1) Whether, assuming that the Commissioners were satisfied that the annuities in respect of the advances applied for, as regards the lands in the county of Galway, could not be duly paid, they were entitled or had jurisdiction in law, for this reason, to refuse to declare the lands fit to be regarded as a separate estate for the purposes of the Act, one of these purposes being the realization of advances in the shape of annuities; and (2) whether, assuming that the Commissioners were satisfied that the holdings on the said portion of the property in the county of Galway were congested, and that the boundaries thereof were confused, and that the holdings required improvement, they were, for this reason, entitled to refuse to declare the lands fit to be regarded as a separate estate for the purposes of the Act, one of these purposes being to relieve congestion and enlarge holdings, and not to perpetuate congestion and confusion?

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At the request of the owners, the questions were also submitted in the following form:—Whether the Estates Commissioners had jurisdiction to refuse to declare the lands comprised in the originating application as fit to be regarded as a separate estate for the purposes of the Act upon the grounds—(*a*) that the security for the advances applied for was, in their opinion, insufficient; (*b*) that the estate was, in their opinion, a congested estate within the meaning of sect. 6 (5) of the Act; or (*c*) that a number of the holdings were intermixed and in rundale?

A. W. Samuels, K.C., and *W. H. Boyd*, for the owners:—

As the entire estate of the owners is included in the originating application, and as all the holdings thereon are subject to judicial tenancies, the Estates Commissioners are bound to declare it a "separate estate." The question of security cannot be considered until after the declaration has been given. In the Rules and Forms no provision is made to enable the Estates Commissioners to estimate the security prior to that time. In cases coming within the zones it was intended that the Estates Commissioners should be satisfied with the investigation as to value made when the fair rents were fixed. The ground of refusal that the holdings are intermixed cannot be sustained, as the boundaries are defined in the fair rent orders.

Matheson, K.C., and *E. Coll*, for the Treasury:—

Section 98 is the key to the Act of 1903. The scheme of the Act is that when a landlord has agreed with his tenants at prices coming within the zones, nobody can interfere as between them; but all is conditional on the Estates Commissioners making the necessary declaration in the exercise of their discretion. The object of the zones was to protect landlord and tenant. With regard to the question of discretion, we say that the Estates Commissioners had jurisdiction to refuse to make the declaration on the ground of want of security, but not on the ground that the holdings are congested and their boundaries confused.

G. M'Sweeney, for the tenants.

Cur. adv. vult.

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The question to be decided in this case is one of paramount importance. The answer must necessarily have far-reaching effect. An "estate" in Part I. of the Act of 1903 means "any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act." I go back to the Act of 1881, and I find that "an estate" there means "any lands which the Land Commission may by order declare fit to be purchased as a separate estate for the purposes of this Act." I ask myself is it possible to hold that under the Act of 1881, or under the Act of 1903, a landlord or a tenant, or a landlord and a tenant combined, can force the Land Commission to put the machinery of either Act into motion in cases in which they declare that it would be contrary to the public interest that it should be put in motion. The word "may" is used in sect. 57 of the Act of 1881. The same word is used in sect. 98 of the Act of 1903. The expression "declare fit to be purchased" was correct as regards the Act of 1881, because under that Act landlords had no power of selling *estates* direct. *Estates* had to be purchased by the Land Commission. The Act of 1903 required an extension of that definition, because under sects. 1 to 5 the landlord is enabled to sell his estate *en bloc*, direct to tenants and others, and for that reason the word "purchased" was changed in the definition in the Act of 1903 into "regarded" —"may declare fit to be *regarded* as a separate estate for the purposes of this Act"—*e.g.*, any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of direct sales under sections 1 to 5; of sales under sect. 6, when the Estates Commissioners buy from the landlord; and of sales under sect. 7, when the Estates Commissioners buy from the Land Judge. And, as if to emphasize the meaning and intention of the statute, the definition in sect. 98 goes on—"and the said expression in Part II. of this Act has the same meaning, with the substitution of the Congested Districts Board for the Estates Commissioners." Have the Estates Commissioners power to decide, without going into the question of particular agreements, that an estate offered to them under sect. 6, or under sect. 7, is one that they will not buy, and will not make any proposal to buy? Can a landlord under sect. 6 say—"I have brought my

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estate within the zones, and you must buy it?" Can the same principle of compulsion be applied under sect. 7? Can the Congested Districts Board be forced to buy because a property has been brought within the zones? Clearly not. But then it is said that a landlord who sells direct can, by bringing his case within the zones, alter the whole aspect of affairs, and force the Estates Commissioners to advance the money and to declare the estate an "estate" because he has entered into agreements with his tenants within the zones. That was the argument before the Estates Commissioners, if I may judge by the note which Mr. Commissioner Wrench has sent in along with the formal order made by direction of Mr. Commissioner Finucane and Mr. Commissioner Bailey. I cannot accede to the argument. I hold that no *definitive* step can be taken, with regard to the sale of an "estate" under the Act of 1903, until the condition precedent has been fulfilled, and a declaration by the Estates Commissioners or the Congested Districts Board, as the case may be, has been given. Section 1 proceeds upon the basis that such a declaration has been made. Then, and not till then, does the question of zones arise. It would appear to me that one of the reasons for the great change effected by sect. 1, with regard to security, may have been that the Legislature felt that when the Estates Commissioners had, in the exercise of their discretion—for it is a discretion—declared lands fit to be regarded as a separate estate, then the provisions of sect. 1, with regard to agreements and advances in cases coming within the zones, might with safety be applied. I will refer to two passages on the question of discretion in order to indicate my view as to the extent and limitations of the discretion to be exercised by the Estates Commissioners. I do not hold that they can, for no other reason than that they do not think fit to make the declaration, exclude an estate from the provisions of the Act. The fact is sometimes overlooked that the Estates Commissioners are Land Commissioners, and exercise all the powers and duties of the Land Commission, under sects. 1 to 23, and, of course, duties of a judicial and semi-judicial character are exercised by the Land Commission. Dealing with the question of judicial discretion, Sir George Jessel, in *In re Taylor, an infant* (1), says:—"When I

(1) 4 Ch. D. at p. 149.

say 'the discretionary power of a judge,' I mean that though the Act of Parliament gave the power in the most ample terms in which language could express it, . . . yet, of course, like every other power given to a judge, the discretion of the judge is to be exercised on judicial grounds, not capriciously, but for substantial reasons." In *Sharp* v. *Wakefield* (1) Lord Halsbury says:—"An extensive power is confided to the Justices in their capacity as Justices, to be exercised judicially; and 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (2); according to law and not humour. It is not to be arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself." Now, I am not going to sit in judgment upon the decision of the Estates Commissioners on the facts as disclosed in this case. All I say is that, according to my view, they were entitled on the facts, in the due and proper exercise of the discretion conferred upon them by the statute—using the word "discretion" in the sense indicated by the authorities to which I have referred—to decide as they have decided. I answer the questions submitted by the Estates Commissioners in the affirmative. With regard to the other questions submitted by owners, I answer (*a*) and (*c*) in the affirmative; (*b*) has been withdrawn.

Solicitors for the owners: *William Fry & Son.*
Solicitor for the tenants: *V. Kilbride.*
Solicitor for the Treasury: *Sir Patrick Coll.*

J. E. W.

(1) [1891] A. C. at p. 179. (2) 5 Rep. 100a.

Land Com. 1905.

Feb. 4.
June 24.

CAPTAIN C. J. COOTE AND OTHERS, LANDLORDS; THOMAS WALSH, TENANT (1).

Landlord and tenant—Fair rent—Declaration and agreement—Filing of—Purchase agreement—Bona fide *transaction.*

An originating notice of an application to fix the fair rent of a holding was signed, and a declaration and agreement fixing the fair rent was entered into by a landlord and a tenant on a certain day. Subsequently, on the same day, a document purporting to be a purchase agreement was signed by the tenant alone. On an application to file the declaration and agreement:—

Held, that in the circumstances of the case the application should be granted.

Held, also, that in the event of a purchase agreement being afterwards entered into, the fact of the application having been granted did not necessarily involve that the Estates Commissioners would not be at liberty, before taking action in the matter, to satisfy themselves that the entire transaction was a *bona fide* transaction.

APPLICATION to file a declaration and agreement fixing the fair rent of a holding. The circumstances under which the application was made appear sufficiently from the judgment.

W. M. Jellett, K.C., for the landlords, in support of the application.

Cur. adv. vult.

June 24.

MEREDITH, J.:—

The facts of the case may be briefly stated. The holding consists of 16A. 7R. 2P. held at a rent of £1. On December 22, 1904, the landlord, by his agent, and the tenant, in person, signed an originating notice to fix a fair rent in respect of it. The existing tenancy was an ordinary tenancy from year to year, not a judicial tenancy. On the same day a consent was entered into that the fair rent of the holding should be fixed at the sum of 18*s.* The signature of the tenant was properly witnessed, as pro-

(1) Before MEREDITH and FITZGERALD, JJ..

vided by the Rules. On the same day, but after these documents were signed, a purchase agreement, in the usual form, was signed by the tenant. The question, so far as the Court is concerned, is whether the fact of the purchase agreement having been signed by the tenant justifies the Court in refusing to make the consent entered into by both parties, according to the ordinary rules and practice, a rule of Court. I am of opinion, and my colleague agrees with me, that these cases should be decided on their particular facts. Now, the document signed by the tenant bears no date. It is an absolutely incomplete document. I may incidentally mention that the clause dealing with the sporting rights is improperly drawn. The document is worthless, and could not be relied on or presented to the Estates Commissioners in its present form. But, apart from that, the point is this, that the relationship of landlord and tenant was not and could not have been even conditionally determined at the time the consent fixing the fair rent of the holding was entered into. If the purchase agreement had been signed by the landlord as well as by the tenant, the *Talbot-Crosbie's Estate* (*Catherine Duggan's Case*) (1), would have applied at some stage. But the relationship of landlord and tenant exists and is in full force at the present moment, and both the landlord and the tenant now come into Court and ask to have the consent which has been properly signed, fixing the fair rent of the holding at 18*s.*, made a rule of Court. The difficulty which weighed on the mind of my colleague, and on my own mind, before the judgment of the Court of Appeal in *Talbot-Crosbie's Estate* (*Mary Walsh's Case*) (2), and even more so since the judgment, is that, in our opinion, the Legislature contemplated that transactions, in order to come within section 1 of the Act of 1903, must be real transactions. It is perfectly plain that if a landlord were, for the purpose of coming within that section, to deal with an outsider, and to make that outsider a tenant, whether a judicial tenant or not, but if a judicial tenant then one who would come within section 1, the Estates Commissioners would have full power to do what they did in *Catherine Duggan's Case* (1), fortified by my decision that they were correct. The Court of Appeal have laid it down in the clearest terms that these trans-

(1) 39 Ir. L. T. R. 54. (2) Since reported—[1905] 1 I. R. 570.

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actions must be real transactions. It is absolutely impossible to devise any plan consistent with the Rules of Court and the Act of Parliament for determining at the present stage whether the reduction which the landlord and the tenant have agreed to is a fair reduction or otherwise. They have agreed to it, and their agreement has been entered into according to the Rules of Court. We will make this consent a rule of Court, subject to the observation, which applies to this as well as to some other cases on the estate, that we do not usurp the jurisdiction of the Estates Commissioners, if this transaction is followed by a purchase agreement, to consider the question of whether the entire transaction, when read in the light of the documents before us in this application, is a real or unreal transaction. I make no suggestion. I merely point out that the fact of making this consent a rule of Court does not necessarily involve that the Estates Commissioners will not be at liberty, before taking action in the matter, to satisfy themselves that the entire transaction is a *bona fide* transaction. The stage for determining that question has not yet arrived. In *Talbot-Crosbie's Estate* (1), Fitz Gibbon, L.J., says, "It is for the Land Commission, and not for the Judicial Commissioner or for us, to ascertain the 'reality' of every sale for which an advance is sanctioned; but I would say that every tenancy sold must be a real tenancy, and not a tenancy created conditionally, or for the mere purpose of getting money from the State." I desire to make one other observation. In the case of Walsh's holding, relatively—the area is large, and the rent small. There is an affidavit by the agent in which it is stated that all the holdings are agricultural or pastoral in character. There are, however, one or two cases in which, before filing the agreements, we will require some further evidence to satisfy the Court that the parties are not asking us to do what we have no jurisdiction to do—namely, to fix a fair rent upon a holding which is not agricultural or pastoral in its character, or partly agricultural or partly pastoral.

FITZGERALD, J., concurred.

Solicitors for the landlords: *French & French.*

J. E. W.

(1) Since reported—[1905] 1 I. R. 570.

SWEENEY *v.* COOTE.

(1904. No. 1056.)

Barton, J.
1905.
April 19, 20, 27.
May 17.

Appeal.
Nov. 22–24, 28, 29.
Dec. 8.

Conspiracy—Wrongful acts—Injury—Injunction.

The plaintiff, a Roman Catholic, was appointed, with the approval of the National Board, to give manual instruction (chiefly in sewing) in a National School under Presbyterian management. The defendant called a meeting of parents of children attending the school, at which several of those present came to an arrangement to withdraw their children from the school. The result of this action was to injure the plaintiff by reducing her salary, which depended on a capitation grant. In an action brought by the plaintiff, claiming an injunction and damages, Barton, J., being of opinion, on the evidence, that the defendant did unlawfully, and with the intention to injure the plaintiff, conspire with other persons to prevent, by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to the school according to their free choice, and did prevent divers persons from so doing, to the plaintiff's loss and damage, granted an injunction, restraining the plaintiff from so conspiring, and directed the damages to be assessed at Chambers.

On appeal by the defendant:—

Held, by the Court of Appeal (Lord Ashbourne, C., and FitzGibbon and Holmes, L.JJ.; Walker, L.J., *diss.*), that on the evidence the defendant did combine with other parents at the meeting to withdraw their children from the school, and that such withdrawal resulted in loss to the plaintiff; but that the object of the combination was not unlawful, and that no unlawful means were used to attain it, and therefore the plaintiff had no cause of action.

Per Walker, L.J.: That the evidence showed that, on account of the Minister having exercised his right to nominate the plaintiff to teach in the school, a combination was formed, in which the defendant was the chief mover, to have the plaintiff dismissed; that those combining adopted the means of injuring the plaintiff by withdrawing their children, to punish the Minister and to injure the plaintiff; that they did this intending to injure the plaintiff in her position, and did injure her, and there was no just cause or excuse for such action, and that therefore an injunction should be granted, but that under the circumstances there was no need for an inquiry as to damages, as the amount was ascertained by the plaintiff's own evidence.

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TRIAL OF THE ACTION.

This action was brought for an injunction to restrain the defendant from unlawfully and maliciously conspiring with other persons to injure the plaintiff in her business and employment, and for damages. The precise nature of the relief claimed and the pleadings are stated in the judgment of Lord Justice Fitz-Gibbon (*infra*, p. 101).

The case was tried before Mr. Justice Barton, and the following evidence was given at the trial:—

The plaintiff, Rose Sweeney, deposed that she had been a pupil at Carntall School, under Reid, the schoolmaster. The school was a National School, under a Presbyterian manager; that she was a Roman Catholic, and had been brought up and lived with her grandfather, Mark Lynch; that on a vacancy occurring in the school for the post of Manual Instructress, she had applied to Reid, and got a certificate from him as to her fitness for the position. The rest of the evidence, so far as material to this report, is taken from the shorthand writer's note:—

14. What did you do with it (the certificate)? I took it to the Rev. Mr. Bailey, the manager.

15. Were you then appointed instructress? Yes.

16. When? 29th February, 1904.

23. Did anything occur on 9th March? Some children left; a great many did not attend.

40. The boycott of the school still continues? Yes.

42. You are paid by a capitation grant? Yes.

43. Have you made a calculation as to what your losses are? Yes, about £10.

Cross-examined:—

46. How many years were you at this school? Four or five.

47. When did you leave it? I do not remember.

50. How long were you away? I do not know exactly; I left about seven years before, I think.

51. And when you left, about seven years before, you went to another school? Yes.

52. What school was it? Ballyscally.

53. An exclusively Roman Catholic School? Yes, a National School.

65. At the time you left this school there were a considerable number of Roman Catholic children at it? Yes.

66. Why did you leave it? I went to Ballyscally to help the assistant Teacher.

68. You went to help the Assistant Teacher? No, I went to help the average for the Assistant Teacher.

69. And to reduce the average at Carntall? That was not my intention.

70. It did reduce the average at Carntall? Yes.

71. What was the name of the Assistant Teacher at Carntall? Miss Hosford.

John Reid, the principal teacher at Carntall school, was the next witness for the plaintiff. The material parts of his evidence were the following:—

148. How many children left from 9th March and did not return? Twenty-seven altogether; but one or two families continued on for a few weeks.

149. Twenty-seven left altogether? Yes.

150. What were their names? James Steen, Arthur Coote, Robert Barr, Thomas Robinson, Rebecca Monaghan, Willie Scott, Susie Steen, Lizzie Steen, Willie Barnett, Alexander Steen, Allan Coote, Maggie Irwin, Robert Monaghan, Thomas Robinson, Alexander Robinson, Mary Jane Steen, Lizzie Coote, Edwin Armstrong, and Maud Barnett—that is eight girls and thirteen boys, making altogether twenty-one—left on 10th March, and never returned.

151. Of the twenty-seven that left, how many were girls? Eleven.

152. When did the other six leave? The witness gave the dates ranging between 25th March and 27th April.

153. Most of these have gone to Aughentaine School? I heard so.

154. On the Sunday after Miss Sweeney came, did you see the school? Yes.

155. That was 6th March? Yes.

156. What was done to the School? Two crosses were painted on it as if they had been put on it with tar.

157. The school is about 300 or 400 yards from the Presbyterian Church? Yes, they are within sight of each other.

158. Did you see the church? Yes, there were four crosses on the church, put on with tar or black paint.

159. Were they large? Yes, about four feet in length, and one was on the door of the vestry.

160. Were you present when Mr. Bailey and the defendant were talking at the church that morning? Yes.

161 What passed? I first heard Mr. Bailey ask Coote if he had seen that. I remember he pointed towards the church, and Coote said, "Yes, you are the cause of it all yourself." Mr. Bailey appeared

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puzzled and said, "How?" and Coote said, "By appointing that Roman Catholic girl instructress." Mr. Bailey said, "What about that?" Coote replied that there was great indignation up in the neighbourhood, and that people were wanting him to hold an indignation meeting. He said the district was up in arms; but I did not hear him say what district. Mr. Bailey then said, "Then it was a Protestant outrage, and not a Roman Catholic outrage." He also said that he was talking to John Robinson about the appointment, and that he approved of it, and talked of sending back his girls to the school. Coote said, "Wait till you see." Mr. Bailey pointed out that there were some Catholics at the School, and Coote said that the priests and Catholics were boycotting us, and injuring the school. Coote also said, "You should have advertised as they did at Aughentaine." Mr. Bailey said that the attendance of girls was so small that he likely would not get anyone by advertising, and Coote again said, "Wait till you see." I believe they were talking about some other candidate. Coote interrupted Mr. Bailey a great deal. Mr. Bailey said that he had offered it to this girl they were talking about, and she would not take it, and that she did not seem to be ready for it. Mr. Bailey pointed out to Coote that Miss Sweeney had been studying for the Training College, and would be very likely a suitable candidate. Coote said that more than twenty children would be taken from the school.

162. Did you hear Coote say anything about painting the crosses on the school? I cannot say I did. I do not remember him saying anything more.

163. You regarded Miss Sweeney as a competent person for the post? Yes.

166. How is she paid? On the average of girls in attendance; if the average is over twenty, £24 a year, and if the average is below twenty, £1 a head, or 5*s*. a quarter; and that is all the remuneration she gets.

167. So that every girl taken away reduces her income? Yes, girls, but not boys.

169. Was it a mixed school? Yes, always in my time.

Cross-examined —

175. Relations between you and Coote have not been very friendly for some years? No.

176. Did he complain of you to the National Board? Yes, he wrote.

177. Did he tell you he intended to remove his children long prior to this? No.

178. Had he removed them? He summoned me to the Petty Sessions Court for chastising his boy, and the case was dismissed, and they stayed away for six months, and then they came back.

188. What was the average attendance? Over fifty long ago.

189. It has been going down for some time? Yes, it maintained an assistant in my time—Miss Hosford.

She was a Protestant? Yes.

191. What is the limit that entitles a school to have an assistant? Fifty in her case.

192. Was Ballyscally under Protestant management? Not in my time.

193. Do you remember Miss Sweeney leaving you? Yes.

194. Did she make any complaint about your treatment? No.

200. How many other Roman Catholic children left your school five years ago? I am not sure, but several left.

216. Coote summoned you for chastising his son, and the case was dismissed? Yes, in November, 1902.

217. Then he complained to the National Board? Yes, relative to the same matter, and an Inspector was sent down.

218. You were reprimanded by him? Yes; and I appealed, and I was exonerated.

236. At this interview on Sunday, 6th March, were you present all the time? Yes.

237. Did you hear Coote say, when asked had he seen these crosses, "Yes, and I am ashamed to see them"? No, I did not hear him say that.

238. Did you hear him say—"Yes, they are a disgrace, but not more so than your treatment of the feelings of the people in this congregation"? I did not hear him say "congregation." I think he said "feelings of the people in the district."

239. Did you hear him compare it with the outrage on the feelings of the people? There was something about that.

240. Did you hear him say anything about the circumstances under which Rose Sweeney left the school? I heard him say that the priests were boycotting the school.

241. Did you hear him say that it was by the removal of these children that Miss Hosford, the former assistant, lost her appointment? Yes, I think so.

The Rev. William Henry Bailey, Presbyterian Minister at Clogher, Patron and Manager of Carntall School, was next examined:—

296. Do you remember plaintiff coming to you with a recommendation? Yes, she had been a former pupil at the school, and I had seen her, with Miss Vaughan, being trained by Reid.

298. You then appointed her? Yes, subject to the approval of the National Board.

300. You knew she was a Roman Catholic? Yes.

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301. Do you remember having a conversation with John Robinson, senior, of Mullabeeny, about this appointment? Yes; it was on the very evening I made the appointment, in the beginning of February.

302. He was at the meeting in March? Yes.

303. He knew Miss Sweeney was a Roman Catholic? Yes.

304. What did he say? "Oh, who would think about that for teaching little children to sew?" I may say I thought this man would be a a good one to feel the pulse of the people, as he was an extreme man, and, therefore, I was quite satisfied.

305. The plaintiff entered on her duties? Yes.

306. Do you remember the Sunday following? Yes.

307. What happened? When I came to the church, I was shocked to see four large representations of the cross on the church, one on the vestry door, large black crosses. I heard then there were crosses also on the school at the same time. They were four feet or so long, or larger. The sexton had tried to wash them out before I came down with whitewash.

308. Did you see Coote that morning? Yes; I spoke to him and asked him, as a prominent man, "What is the meaning of this outrage?" This was before the service in the Sunday School, and he said, "It is very plain what is the meaning of it," and I said, "How?" He replied, "Your conduct." I said, "My conduct! What conduct?" He said, "Your conduct in appointing that Roman Catholic girl as teacher." I said, "Oh, then it is a Protestant outrage, and not a Roman Catholic outrage." He went on to say that all Killyfaddy was up in arms, and the children would be withdrawn from the school, and that he had heard that over twenty children would be withdrawn on account of it. I expressed my amazement, and he demanded why did not I advertise, and I said, "Advertise for such a trifling situation! surely no one would come from a distance to accept such a situation for £14," which is on the average attendance. He said there were Protestant girls in the neighbourhood that could be got, and he mentioned Miss Vaughan, a sister of Miss Vaughan who had been Manual Instructress. I had thought of her, and I had gone to see her, and asked would she think of taking it: she was away in a situation in Belfast, and her mother had said she would not take it. I told Coote I had inquired if she would take it, and that she would not.

309. Did he say anything further? Yes; he is an eloquent man, and I could not possibly follow all he said. He spoke in a high key, and the roof is low. I could not remember all he said. He was angry, and I was feeling dreadfully stomached at the time. He said, "At such a time as this, too, after the Catholic Association has been brought to light."

310. Did he say anything else? He said it was "the beginning of the end," that was after he mentioned about the children being

withdrawn; and he went downstairs saying it was abominable, loud enough for a number of people to hear who were standing down below.

311. Did Coote say or do anything in condemnation of the crosses being painted on the church? No; that is what I felt worst. No doubt he felt—— Well, I do not know how he felt—I mean that I was going to say he would naturally feel hurt at the defacing of the church. The meeting was held on the Tuesday after—8th March. I did not get a letter asking me to attend till 7 o'clock in the evening of 8th March. The meeting was to be held over a mile away from my manse. I understand it was delivered to my wife at 3 or 4 o'clock on 8th March; but I did not get it till 7 o'clock, as I was out visiting.

314. Do you remember a meeting of session being held on 25th April? Yes, about then.

315. Was the defendant present at that meeting? Yes.

316. Did he say or do anything in reference to this appointment? We had a lengthened conversation about the whole matter, and I was endeavouring to throw oil on troubled waters; but Coote was very hot indeed, and I remember at the close of the meeting, just before our sacrament, I appealed for charity in all these matters, and Coote's answer was—"How can I be charitable to a man whose action compels me to send my children away to a school at a distance?"

319. Did he say anything in condemnation of the Canon? Yes, very strongly, for interfering and preventing the school being boycotted.

Cross-examined:—

328. You knew this appointment was distasteful to a certain number of the congregation? I thought there would be no controversy.

329. You knew it was a thing not likely to be swallowed by them? I thought there was no trouble about swallowing it.

330. Was that why you spoke to John Robinson about it? It was the first time a Roman Catholic had been appointed, and I wanted to see if there would be any objection.

345. While you were manager children began to desert Carntall and go to Ballyscally? There is a great pull between several schools to keep up a sufficient average to keep an assistant teacher. Everyone of us does all he can to get as many pupils as possible. My good friend, Canon Haire-Forster, tries to get all he can, and the neighbouring Presbyterian Minister does the same.

346. Was any action taken against them? I do not know of any.

347. Were there a large number of pupils withdrawn from Carntall and sent to Ballyscally? Yes.

348. In consequence of their withdrawal the average of Carntall fell so much that you lost your assistant teacher? Yes, Miss Hosford.

349. She was a Presbyterian? Yes.

350. She had been there over twenty-five years? Yes.

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351. When did she leave? About four or five years ago: much to my regret and that of the whole congregation. She was exceedingly popular.

360. You were very much excited when you saw these crosses? I felt very deeply about it.

361. Did Coote feel very deeply about it? He seemed to feel very deeply about my conduct.

362. He said—"This is the beginning of the end"? Yes.

363. What did he mean? That it would finally break up the school and ruin Mr. Reid.

364. Did you think there was any reflection against yourself? No, it did not occur to me.

365. Did he say—"These crosses are a disgrace, but not more than your treatment of the congregation"? He may have.

[Letter from Coote to Bailey, *infra*, p. 74, read.]

369. When did you first hear this meeting was going to be held? Privately, the night before—a boycotting meeting to boycott the school—and I sent down to Vaughan and asked him to go to the meeting.

370. Why did you not attend this meeting of your own parishioners yourself? It occurred to me I would not be welcome, especially as I had not been asked; and also my permission should have been asked whether a meeting should be held or not.

374. Did you take any notice of this letter? No; the only notice I could have taken would have been to go to the meeting, and I might have gone if I had had time.

375. Why did you not go? Because I was not asked.

376. Did you send a man called Robert Smith? I asked him to go.

377. Also Henry Condon? Yes.

378. Adams? Yes.

379. And yet you were conspicuous by your absence? Yes.

380. But you sent these others? Yes, I asked them to go.

381. Why? I heard misrepresentations were being made in the country about this girl—that she was to replace Miss Hosford, and to get £30 a year, and take bread out of Presbyterian mouths. I asked these men to go and tell the truth, that judgment might not go by default.

382. You sent these men as spies? No. And another reason I did not go to the meeting was I had been talking all the evening, and am subject to sore throat, and was so worn out that I did not feel able to attend the meeting and speak, especially where Coote was.

Re-examined:—

419. I suppose you would not like to go to a meeting to boycott the school? No.

420. And to condemn your own conduct? No; but if I had thought my going would serve any good purpose, I would have gone. But I did not see what good could come of it: as it was to make me dismiss the girl, I resolved not to be forced to do that.

The Rev. Canon A. Haire-Forster was the next witness called:

425. Are you rector of Clogher? Yes.

427. You know Mr. Coote? Yes.

428. Do you remember meeting him shortly after this dispute? Yes.

429. I believe you are a member of the Orange Lodge? Yes.

430. You met him at a meeting of the Orange Lodge? Yes.

431. Did he say anything with reference to your conduct in this matter? I am in a delicate position, as the meeting was a private one, and unless his Lordship directs me to do so, I do not wish to answer.

BARTON, J.: There is no privilege.

432. What happened at the meeting? He brought my name before the members of the Lodge as having been guilty of very outrageous conduct, inconsistent with my position as a Protestant minister, and member of the Orange Lodge.

433. That is, in aiding and backing up this Roman Catholic? Yes, exactly. What he complained of was that I used my influence with some of my people not to withdraw their children from this school. I had done so—that is, I spoke to my people at the request of Mr. Reid. I said to Mr. Coote that I looked upon it as an outrageous piece of boycotting, and I would be very sorry if any of my people took part in it; and that I did not see how a man could denounce boycotting on one platform and advocate it on another.

Cross-examined:—

446. Did you take any children away from the school? Not directly. There was one family called M'William. I spoke to the mother about their attending the school that was practically under my management. I pointed out to her the advisability of their coming to my school, which was equally near to them.

447. Nobody threatened an action against you? No, I do not think I was conscious at the time where these children were going to; I knew they were not coming to my school. When I spoke to their mother, she said they were under Miss Hosford, and were attached to her, and as long as she remained they would stay there; and that is the only conversation I ever had about it.

Robert Smith was next called:—

453. You are a member of this congregation? Yes.

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454. You remember on 7th March, 1904, Mr. Bailey speaking to you about a meeting that was to be held? It was on 8th March.

455. You had some nephews and nieces at the school? Yes; three or four.

456. Did you go to the meeting in consequence of what Mr. Bailey said? Yes.

457. Who was there? A number of people, including Coote.

458. What o'clock did you go there? About 7.30 o'clock.

459. What was going on when you arrived? All were talking about various matters. Coote said they were waiting for Mr. Bailey, and he read a notice that he said he had sent to him that evening. I said I saw Mr. Bailey at my father's place at 6 o'clock, and that he might not be in time to get the notice. Nothing more was done for about fifteen minutes. Then Coote said he could wait no longer on Mr. Bailey, as he had ample time to be there or send an apology why he did not come. Thomas Monaghan said it would be better to adjourn the meeting, and allow Mr. Bailey to attend the meeting. Coote objected to this, and he began, and he asked the people individually all round what they would do. And John Robinson, before mentioned, said he would take his boys away. Coote went round and asked them all personally, except myself and George Vaughan, what they would do. He wrote down their names or numbers, and calculated something over twenty children that were to leave the school.

460. Did he mention anybody not at the meeting that would withdraw their children? Yes, he speculated on one or two.

461. Wilson and Donaghy? Yes.

462. Was there a discussion about withdrawing the children? Yes, he asked them all round just to withdraw. Thomas Monaghan objected, and said there was one of his children too small to go to Aughentaine, and Coote said he would convey it at least half way, and some of the family would accompany it the rest of the way. He asked Thomas Monaghan the same as the others. He at first consented, and then he said one of his children was too small to go to Aughentaine, and Coote said he would carry or convey it at least half way. Somebody suggested to write to Mr. Bailey—I do not remember who it was—to tell him of their grievances. Coote objected to that; that Mr. Bailey would show it to the priests the first, and then they would be termed Orange bigots.

463. When Coote was going round the meeting, did you say anything? Yes: that they were about to destroy the school, and if they withdrew the children they would never get them back again.

464. Did Coote say anything to that? I don't remember.

465. Did you say anything about Miss Sweeney? I said it was not worth while taking away the children and making a row, as the poor girl was only getting £14 a year; and Coote said that £14

was very good; she would give £2 to Bailey, and the rest to the parish priest for the repose of old Mark's soul.

466. Your niece is still at the school? Yes.

467. You refused to join in the boycotting? They did not ask me.

Cross-examined:—

505. You had no interest in the school? Yes; my sister's children were there. I had an interest on their account only.

506. Then what brought you to the meeting? I had a perfect right to go. I was speaking to Mr. Bailey about this, and I asked him was he going, and he said he was not noticed, and he asked me was I going, and I said yes, and he said it would be well that I should go and arrange matters.

507. Then it was at his suggestion that you went? Yes.

509. Did he tell you why he was not going? He said he was not noticed to attend.

510. Were you noticed? No.

511. And yet you went? Yes.

512. From what you know now, was there a strong feeling in the minds of a number of persons at the appointment? Yes. I knew that at the meeting some were for, and some against it.

520. When you went to this meeting, they were discussing the question of the appointment? No; various general matters not connected with the appointment.

521. They waited some time for Mr. Bailey? Yes; Coote said they were waiting for Mr. Bailey; and I said I saw him at my father's place, that is about two miles away from the Manse, and that he might not have got the notice.

522. Did you not tell us that Bailey told you he was not going to the meeting? Yes.

523. Did you tell that to the meeting? No.

524. But you said they ought to wait? Yes; but he had not been noticed at the time he told me he was not going.

548. What happened at the meeting? What did Coote say? He asked them what they were going to do.

549. He asked each person what they were going to do? Yes; he first said they were waiting on Mr. Bailey.

559. Did the different persons who gave their names say they would withdraw their children? Yes; first of all John Robinson said he would withdraw his boy; and then Coote went round all the others and asked them what they would do.

William Adams was then called for the plaintiff:—

581. You live near this school? Yes.

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582. Had you some children attending it? Yes.

583. Did you get this notice to attend the meeting on 8th March? Yes.

584. Were you at it? Yes.

585. What time did you go? About 7 o'clock.

586. There was general discussion when you arrived? Yes.

587. You heard Coote say they were waiting for Mr. Bailey? Yes.

588. You heard Robert Smith say he might not have got notice? Yes.

589. What occurred at that meeting? I do not remember much about it. Coote asked us whether we would take away the children.

590. What then? He asked me would I take away my children, and I said not; and he said I was quite right, and that is all, so far as I remember.

591. Did he take a note? I think he did; I do not remember much about it.

592. Do you remember somebody suggesting that Mr. Bailey should be written to? Yes.

595. When somebody suggested that Mr. Bailey should be written to, did Coote object? No; I do not remember that.

597. Did you hear Robert Smith mention about there being a great fuss about £14 a year? Yes.

599. Was anything said about old Mark by Coote? There was.

600. What was it? Something about his soul, but I forget it.

602. Was it after Robert Smith's observation about the £14? Yes, it was after that.

Cross-examined :—

605. All the people at the meeting were Presbyterians? So far as I know.

608. This matter of the support of the school was one you had all been interested in? Yes.

609. It had suffered through children being taken away to Ballyscally? Yes, I heard so.

610. That was matter of talk amongst the Presbyterian parents? Yes.

611. At that meeting Coote told you you were quite right not to take your children away? Yes; he said he thought it was too far to go.

612. Did Coote say he would not like to see the school injured? Yes.

613. Did Coote say they were waiting for their clergyman? Yes; he said he had noticed him to come.

638. Do you remember when the £14 was mentioned anything being said about Miss Sweeney giving £2 to Mr. Bailey? No.

639. Do you remember Coote saying she would give Mr. Bailey £2 for the place, and £12 for old Mark's soul? I remember about old Mark's soul, but not the other.

The plaintiff's case was then closed, and counsel for the defendant asked for a direction on the ground that there was no evidence of any actionable wrong committed by the defendant.

The Judge refused to give a direction for the defendant.

The defendant, William Coote, then entered the witness-box, and was examined :—

655. You have been for a long time a member of this congregation? Yes, twelve years.

656. And for eleven years a Ruling Elder in the Church? Yes.

657. There has been some considerable friction between yourself, Bailey, and Reid? Yes.

658. On the Sunday on which the crosses appeared on the church and school, had you directly or indirectly anything to do with placing these crosses there? No, neither directly nor indirectly.

659. Were they put there with your knowledge or consent? No.

660. Or with your approval? No.

661. Or with your disapproval? No, I had nothing whatever to say to them.

662. You saw them that Sunday morning? Yes.

663. Did they meet with your approval then? No.

664. Did you take steps to have them removed? No; I did not interfere with them, but when I went down there was a Mr. Mills there who was rubbing them out with whitewash; and when I went down to the churchyard, I told the caretaker to go for the police and let them know of the outrage.

665. Had you a conversation that morning with Mr. Bailey with reference to these crosses? Yes; he came to me when the Sunday School was over, and said—"Do you see this insult that has been thrown down here?" and I said—"I have, and I am ashamed of them. They are scandalous, but not more so than your conduct to the people of this Church." He said—"Why, what do you mean?" I said—"You must know very well what I mean about the feeling in the district about the appointment you have made in the Day School." That was Rose Sweeney's appointment. I further said—"Are you aware that she would not allow her education to be completed in Carntall, and that by her leaving with others drove out Miss Hosford, who was here twenty-five years, without any pension?" Mr. Bailey said he was not aware that she had so left the school.

666. Did you say anything about children being withdrawn from the school? No; but I asked him did it not occur to his mind to consult the Committee of the Church, and he said the Committee had

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nothing whatever to do with the school, as he was both manager and patron himself.

667. After this conversation with Bailey, had you a conversation with James Johnston? Yes, going home from the church.

668. In consequence of what he said to you, I believe you determined on the following morning to take some action in the matter? Yes.

669. On the morning you wrote out that notice which has been read asking some of the parents to attend a meeting, and asking them not to withdraw their children in the meantime? Yes.

670. Was that letter written by you in consequence of statements made to you by James Johnston? Yes.

671. On that Sunday after Church, what passed between you and Johnston? Johnston told me about a conversation between him and Mr. Bailey, in which he told Mr. Bailey that upwards of twenty children would leave the school in the morning, and I said—"This will be too bad, it would be a pity, and I am sure none of us would like to see the old school knocked down and rent asunder."

673. It was in consequence of that conversation you wrote that letter? Yes.

674. Was that letter written by you *bona fide*? Yes.

675. Had you any ulterior motive? Quite the opposite.

676. And was your honest intention expressed in that letter? Yes, it was to keep the children from leaving the school.

677. You sent that letter round on the Monday morning? Yes.

678. By one of your servants? Yes.

679. To any other people except those who had children at the school? Only to four people altogether, and they had all children at the school.

680. You also wrote a letter to Mr. Bailey telling him of the meeting, and asking him to attend? Yes.

681. Did that letter enclose the notice you sent out? Yes, a copy of it.

682. Was that letter written by you *bona fide*? Yes.

683. And without ulterior motive? I had none whatever.

684. And without any intention of injuring Miss Sweeney? None whatever, nor anybody else.

685. You attended the meeting that evening? Yes.

686. Was Mr. Bailey present? No.

687. When did the meeting assemble? About 7 o'clock; it was convened for 7 o'clock.

688. Were there any persons present other than those you sent the notice to? Yes.

689. Did you write any other persons to be present? Yes, John Scott and Thomas Monaghan.

690. Who were there on your invitation? John Scott, Thomas Monaghan, J. Steen, James Johnston, John Robinson, senior, and John Robinson, junior.

691. These people had all children attending the school? Yes.

692. You asked no person who had not children at the school? No.

693. These six people were all you asked? Yes.

694. You asked no person who had not an interest? No.

695. You waited for Mr. Bailey? Yes, three-quarters of an hour. At the end of that time I apologised to the people present for Mr. Bailey's not being there, and said I had written to him, and I had hoped he would attend. I appealed to them all as Protestants, and as she was a Roman Catholic, that they should try to meet the case; and that I hoped some agreement would be come to that she would not be interfered with during her time in the school. I said that publicly in the meeting.

696. Did you say anything about your own views as to her appointment? I said I did not believe in her appointment, as she was of a different faith, and had been one of those who had left the school and driven out our second teacher. She was such a grade of Catholic that she could not stay at the school as a pupil.

697. She was of such a particular Catholicity that she could not remain in the school? That was the reason I objected. It was not a meeting, properly speaking. It was just general conversation.

698. Did you ask persons to withdraw their children? There is no foundation for that whatever. There is not the slightest truth that I asked either before or after the meeting any people to withdraw their children from the school.

699. Either directly or indirectly? No, neither.

700. There was some question with reference to how many children would be withdrawn? After I apologised for Mr. Bailey's absence, Johnston said—"I am very sorry you brought us here at all," and he added that he would take away his boy in the morning; and he commenced to ask each person what they would do, and I commenced to make a mental note of those parents who said they would take their children away; and when I commenced to get confused with the number, I took out paper and made a note, and at the end I said, "I am sorry to say there are thirteen children to be taken away."

701. At that meeting did you directly or indirectly by threats or menaces induce any person to withdraw their children? No.

702. Or at any other meeting? No.

703. Or at any other time? No.

704. Do you remember anything being said about £2 being given by Miss Sweeney to Mr. Bailey? No; it is entirely false. There was

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nothing whatever mentioned about it that I heard. It is absolutely untrue. There was nothing whatever said about £2 to Mr. Bailey. That is a deliberate misstatement.

705. Was there anything said about £12 for the repose of old Mark? No; but when we were leaving the meeting, somebody said in a jocular way that they supposed she would contribute to the Church, and I said, "No; it would be for the repose of old Mark's soul," but I did not say it in an insulting way at all.

706. What passed about driving the children of Thomas Monaghan? When the word was going round the room about withdrawing the children, Monaghan said one of his children would not be able to walk to Aughentaine, and I said my children would be going in my trap, and they would be very glad to give his children a lift.

707. The following day you withdrew your own children from the school? Yes.

708. You regarded this appointment as the culminating point? Yes; and I regarded Mr. Bailey's not turning up as an insult to us, and that that just ended the matter.

709. In all this business had you the personal position of Miss Sweeney in your mind at all? No, I had not.

711. So far as you know did the rest of the people at that meeting come as volunteers? Yes.

712. Did you exercise any compulsion over them? No, none whatever.

Cross-examined:—

713. You did not want to interfere any further in the matter? No, not after that night.

714. When did your determination not to interfere any further commence? At the meeting.

715. You took no further steps? No.

716. You wanted the school to go on? Yes, that was my intention.

717. And you wanted the children to attend the school? Yes, whether Miss Sweeney was there or not.

718. And as a result you took away your children? Yes, as a protest because Mr. Bailey did not come to the meeting.

719. Then it was to punish Mr. Bailey? No; it was because the people felt an explanation was necessary, and he told us that no other girl was available, and we had hoped that we could heal matters up if he came.

720. And was that "the beginning of the end"? Yes; what I meant by the beginning of the end was his usefulness in the congregation, as he had not consulted us.

721. It was not the beginning of the end of the school? No, not at all.

722. But you also offered to drive Monaghan's little girl away to Aughentaine?

723. Yes; but I draw children to Carntall school yet as well.

724. Was this all because Miss Sweeney was a Catholic? No, because she was such a Catholic that she could not stay at the school, and by her leaving had deprived us of Miss Hosford, the assistant.

731 You did not like the appointment of Miss Sweeney? No.

732. You would have been glad if she left? No, most decidedly not, once she was there.

733. Was that the reason you attacked Mr. Bailey? I did not attack him; he came and spoke to me. It was a reply, not an attack.

734. You said that "all were up in arms"? No, I did not. Mr. Bailey is mistaken. I said, "You must know about the feelings of the people in the district."

735. Did you say that over twenty children would be withdrawn from the school? No; it was Johnston that said that; he told me when I was talking to him after the interview that he had told Mr. Bailey, so Mr. Bailey was mistaken when he says that it was I that told him.

736. It was not because Miss Sweeney was a Roman Catholic that you took these steps? It was to try to appease the wrath of the parents of the children at the school that I called this meeting.

737. Was it for that reason you attacked Canon Haire-Forster in your own Orange Lodge? There, again, he is wrong. What I did in connexion with him was when he was present at a meeting I asked him why he was going about the country saying I was a boycotting Orangeman; and I asked him did he know the real facts of the case; and he said he did not.

749. You wish to benefit this school? Yes, compatible with an honourable explanation from Mr. Bailey as to the appointment.

750. Did not he give you an honourable explanation? No; because I knew he could have done much better.

751. And dismiss Miss Sweeney? No; I mean it was before her appointment he could have done better. If he had come to the meeting and shown us that he had done his best, I had hoped the people would all agree to let matters go for the two years or so Miss Sweeney would be in the school.

752. How would his explanation affect the others? When he had come and explained matters to the people, I would have appealed to their good sense and propriety.

753. Did your good sense and idea of propriety not lead you to do so? I would have done so if he had turned up.

754. You would have appealed to the others to accept this appoint-

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ment, and yet you refused to accept it yourself? Yes, I would have accepted it myself, but my children were leaving the school in any case.

755. Notwithstanding Mr. Bailey's statement that it was impossible to get anybody else but Miss Sweeney, you were not satisfied? No; I knew he could have got others if he had only made the effort.

756. I suppose he told you he could not find anyone else? The only one he admitted he had asked to take the post was Miss Vaughan, and her mother had refused to Reid. He did not advertise or mention it even to the Committee.

761. You were asked about the statement made at this meeting about the £2 for Mr. Bailey? I say that statement of Smith's, not backed up by anybody, is a deliberate falsehood. I believe he came to the meeting to see what he could get out of it.

762. What did you mean by saying that Miss Sweeney would give £12 for the repose of old Mark's soul? I meant that whatever she might do towards contributing, she would not contribute towards our Church; that whatever she might do, she might contribute to the repose of the soul of her grandfather, Mark Lynch.

763. Did you say "old Mark"? Yes, I did; I do not deny the words. I did not mean any disrespect to the girl.

764. Did you ask these people to bring all they could to the meeting? Yes, I did not wish it to be a hole-and-corner meeting.

765. If Mr. Bailey had come, would you have been satisfied if he had dismissed Miss Sweeney? No; I say as a Protestant and an Orangeman we would not have allowed him to dismiss her. We all objected to her appointment; but, so far as I was concerned, I would not have been one to dismiss her.

766. Why did you take your children away? Because Mr. Bailey treated us with gross contempt, and I was taking them away in any case.

767. Were you at a session after that meeting? Yes.

768. Do you remember making a statement to Mr. Bailey then? Yes, that was a meeting of session for the transaction of Church business. Mr. Bailey was deploring the absence of people from the Communion, and the low attendance of people generally. There were only two of us present, and I said to him—"If you take my advice, you will take the people more into your confidence." And he said—"What way?" I replied—"In Church work." And I said, with reference to this appointment which is making such a gloom in the congregation—"If you had consulted the people before and taken them into your confidence, things would have been very different." I then said I was sorry to find Canon Haire-Forster going about the country denouncing me and others as boycotters; and it was his action in so doing that I objected to.

769. When Mr. Bailey appealed for charity in all these matters, you said—"How can I be charitable to a man whose action compels me to take my children away to another school?" That is not true; what I said was that if he had been charitable at the time, and had come to the meeting, it would have been all right, and he replied, "I treated your meeting with contempt."

773. Do you remember it being suggested that you should write to Mr. Bailey? No, not that I should write to him; but Robinson said a letter should be written to him protesting, and I said no, I would not do that, because I think Mr. Bailey sees his mistake; and if we write to him, he might take the letter to the priest and show it to him for the purpose of making us scapegoats.

774. And then prove that you were Orange bigots? No, that he might use it to show that he had dismissed this girl on account of the Orange bigots. That is the correct explanation.

775. Then a letter was suggested remonstrating against Miss Sweeney's appointment? There was a statement by Robinson that a letter should be written, but no letter was written, and I did not make any suggestion about writing. I said, "I believe Mr. Bailey is now anxious to dismiss the girl, as he sees his mistake; and if you write, he will show the letter to the parish priest as a reason why he was obliged to dismiss the girl." I objected to a letter, and said I would not be a party to such a thing.

776. You knew of this outrage to the church before you came to it? Yes, I heard of it.

777. You did not attribute it to the Catholics? No; I did not, I did not know who did it.

778. To whom did you attribute it? To some fool of a Protestant who had not the courage to speak out.

James Johnston was then examined on behalf of the defendant:—

827. You are a farmer? Yes.

828. And reside in Dromore? Yes.

829. You are a member of this congregation? Yes.

830. Was there a child a cousin of yours at this school? Yes.

831. Prior to Miss Sweeney's appointment? Yes.

832. It was a boy? Yes; he had been attending the school for five years; he was an orphan, and I had reared him.

833. Were most of the people who had children at the school members of the congregation? Yes.

834. Was the school exclusively Presbyterian? Yes, mostly.

835. Some years before had some children been taken away to Ballyscally? Yes, I heard so.

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836. Rose Sweeney was one of them? Yes.

837. Was her appointment as Manual Instructress received with satisfaction or dissatisfaction? Well, they were scarcely pleased about it.

838. You mean they were displeased? Yes.

839. You were one of the persons displeased? Yes.

840. Why? Because she was taken away from the school and deprived us of our old assistant, Miss Hosford.

841. Had you any objection to her being a Roman Catholic? Yes, of course a Presbyterian would be able to give religious instruction.

842. You would prefer a Presbyterian as being able to give religious instruction? Yes.

843. As a matter of fact, is there half an hour a week in which religious instruction is given to the infants? Yes.

844. And you preferred that a person filling this appointment should be a person to teach according to Presbyterian principles? Yes.

845. Why did you object to Miss Sweeney's appointment? On the grounds of her having left the school and deprived us of Miss Hosford, and because I thought she ought to have been a person to teach the children half an hour a week or so in religious instruction, and therefore I thought she should be a Presbyterian.

846. Your principal objection was she was one of the seceding pupils? Yes.

847. You remember the Sunday before the meeting? Yes; I met Mr. Bailey going into the church, and had a little conversation concerning the way they had dirtied the church and the school.

848. Had you at that time had any conversation with Coote about this appointment? No, none whatever.

849. Did you convey to Mr. Bailey your objection to this appointment? Yes.

850. Were you aware as to whether other persons shared that objection? I heard some of them saying there was another school convenient to them.

851. Were you aware that the number was considerable? Yes; I told Mr. Bailey I was informed that upwards of twenty children would be leaving.

852. And was your child to be one of the twenty? Yes.

853. After that conversation you went into the church? Yes.

854. Did you see Coote? Yes, on my way going home from the church I happened to drop across him.

855. Had you a conversation with him about this appointment? Yes, a little.

856. Was that the first conversation you had with him, directly or indirectly, about this appointment? Yes; I said I was ashamed of Mr. Bailey doing this, and without consulting the committee. I was

one of the committee. I suggested to him what I had said to Mr. Bailey, that there would be upwards of twenty children leaving in the morning on account of this appointment. Coote said—"It is a pity to distribute the congregation and the school. Can something not be done?" and I said—"Nothing can be done." He said—"Well, it is a pity"; and the story stopped with that. We were only a few perches together. The next morning I got a letter from him asking me not to send my boy away, as he was going to have a meeting to see what was to be done.

857. Did he understand from you that your boy was to be one of the twenty? Yes.

858. And his letter asked you not to send your boy away, and to attend the meeting? Yes.

859. Did you attend it? Yes.

860. There were a number of others there? Yes.

861. Did you know them all? Yes; there were only seven or eight of the "hearers" there. They were all "hearers" except one, that was Condon, and he had three or four children at the school. He was a member of Canon Haire-Forster's congregation.

862. With the exception of Smith, had they all children at the school? Yes, so far as I know; I reared my little cousin as a father.

863. All the people there were interested in the school? Yes.

864. Was there any chairman at the meeting? No, Mr. Bailey did not come.

865. Was it mentioned that Mr. Bailey was expected? Yes.

866. Did you wait some time for him? Yes.

867. Smith was there? Yes.

868. Did he inform you at the meeting that Mr. Bailey would not be there? Vaughan came in, and said he would not come.

869. After this you began to discuss the matter? Yes.

870. Coote was your Ruling Elder? Yes.

871. He convened the meeting? Yes.

872. After it was said that Bailey would not attend, what happened? Robert Smith said—"You had better adjourn," and someone else said—"When he has not come to meet us, where is the use of adjourning it? it will only prolong things." Coote said—"What are you going to do? Who is for going, and who is for staying?" and he took out a little slip of paper and wrote it down.

873. Had Coote said anything about Bailey being there? Yes; he said he had served this letter on him, and he was to be there. He was always waiting on for Mr. Bailey till Vaughan came in and said he was not coming. Coote then said he had noticed Mr. Bailey and a few of the "hearers" who were parents of children, hoping that if Mr. Bailey had attended matters might have been settled, and they might have come to an agreement and not break up the school.

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874. Did he say if he was going to take his children away? I do not recollect.

875. He asked who is for staying, and who is for leaving? Yes; and when he had counted up, he said—"There are ten for staying, and thirteen for leaving."

876. Beyond asking the views of the people, did he say anything in any way to influence their votes or opinions? No, nothing whatever, in my opinion.

877. He did not ask anyone to go or stay? No, he did not.

878. He simply took down what their view was? Yes.

879. Coote apologised for Bailey's non-attendance? Yes.

880. Did he say anything as to whether his desire was that the children should leave or stay? No, nor used any control whatever except to advise myself to hold on and not take my boy away, but I refused.

881. He advised you to keep your boy at the school? Yes, and I said I could not, that he was discontented at the school; and as Mr. Bailey had not turned up, there was no use following him on.

882. Smith swore that Coote said Miss Sweeney could give £2 to Mr. Bailey for the appointment? No, I never heard a word of that, and I think I heard all that was said.

Cross-examined:—

883. You could not tell us all that occurred in the room that night? No, there was a great deal of nonsense talked not worth mentioning.

884. Was old Mark mentioned? Yes, there was something said about him.

That she might give the £12 for old Mark's soul? Yes, that was what was said.

886. The other £2 was not referred to? No.

887. You say that Coote advised you to hold on your child at the school? Yes, on account of it being our church, and we working members in the congregation, and that we should assist in enlarging it.

888. Was that Coote's view? It was my own view.

889. But still you took your boy away? Yes.

890. In order to assist the school? Yes.

891. And Coote took his children away? Yes, I believe he has.

892. If Miss Sweeney was taken away, would you send back your boy? No; he was discontented with the school ever since Miss Hosford went away.

893. How many years is it since she left? Three or four.

894. And he has been discontented ever since? Yes.

895. What age is he? Fourteen.

896. What age when she left? Ten or eleven.

897. And notwithstanding his discontent you kept him at the school until the day after the meeting? Yes.

898. And it was your view to keep up the school? Yes.

899. And yet you took him away? Yes; because Mr. Bailey would not come to consult us, and see what could be done.

900. What was the meeting held for? Because we were sending our children away to another school and leaving our own congregation.

901. Why were you doing that? On account of the appointment of Miss Sweeney, and Miss Hosford being sent away.

902. But that was three or four years before? Yes.

903. You have no objection to Rose Sweeney herself? No; I do not know the girl at all.

904. You had no objection to her because she was a Roman Catholic. Yes; a little, and because she could not teach religious instruction.

905. Would you ever have approved of an Episcopalian? I would rather have a Presbyterian.

906. You said Coote went round the meeting and said—"Who is for sending, and who is for staying?" Yes.

907. And then he read out the result? Yes; but I did not say he went round. The people went round themselves and gave in their names. I believe he said to Adams—"What will you do?" and Adams said, "He would not," and Coote said, "Quite right."

908. What did Coote say about Monaghan's children? He said—"I will have to get up some kind of a trap for my children, and she can get a seat in that."

909. Do you remember the names of those who would not leave the school? Condon's children and Adams' children.

910. Was there a man called Stewart there? No; there was no Stewart there.

911. Robert Smith? Yes.

912. Are his nephews and nieces called Stewart? They may be.

913. Did you hear somebody suggesting that Mr. Bailey should be written to? No.

914. Did you hear any observation that Mr. Bailey would show the letter to the parish priest? No.

915. I suppose you were not attending very strictly? No; I had my mind made up.

916. You were one of the persons who started this? No; I believe the first was Barnett.

917. Would you have been satisfied to remain on if Rose Sweeney had left? I was only too glad to get an excuse for getting away from it.

918. What was your excuse? I had two. One was that she was a

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Roman Catholic, and could not give the children religious instruction: and the other was that she helped to boycott the school.

919. When did you hear that? Some years ago.

920. Was not Miss Hosford there after she left? Likely she was.

921. For some time? In my belief for some three years.

922. Would you be surprised to hear Rose Sweeney left in 1893? I would. My boy was not there at that time.

923. You do not know when she left? No.

924. Nor when Miss Hosford left? No.

925. Did you hear Coote say it was four or five years? No; he might have.

926. When you went to the church that Sunday morning, did you know what had occurred? No; not till I met Mr. Bailey, and he complained to me about it, and I told him it was in consequence of his conduct in appointing Miss Sweeney. He should have consulted us about the appointment.

927. You only know one thing about her, and that was that she was a Roman Catholic? Yes; and also that she had gone away and left the school, and weakened it.

The defendant's case then closed.

The letter written by the defendant to Mr. Bailey was to the following effect:—

"KILLYFADDY, CLOGHER, CO. TYRONE,

"*March 7th*, 1904.

"DEAR SIR,—I sent the enclosed notice by messenger to Messrs. James Johnston, J. Robinson, Mallaheny; J. Robinson, Glen; J. Steen, on yesterday morning.

"In the latter cases the children were dressed for going to Aughentain school, but they did not go.

"I understand that in response to this invitation, hastily given, a few of the parents are attending to-night.

"I think it is better let you know, so that you may have an opportunity of discussing the matter with them.

"I have used my good offices up to the present to do what I can to keep the place together; but, I confess, I cannot and will not interfere further.

"I am, faithfully yours,

"WILLIAM COOTE.

"REV. W. H. BAILEY,

"The Manse, Clogher."

The notice enclosed in this letter was as follows:—

"Will you please attend a meeting of the parents of children to be held at the old School, Carntall, on Tuesday evening, at seven o'clock, to consider what course we are to pursue; meantime do not send your children, if at all possible, to another school; and get all the parents you know of to come.

"(Signed) WILLIAM COOTE."

Andrew Todd, K.C., and *Muldoon*, for the plaintiff.

J. H. Campbell (*Solicitor-General*), *K.C.*, *Patchell, K.C.*, and *Gaussen*, for the defendant.

BARTON, J.:—

May 17.

In this action the plaintiff, Miss Rose Sweeney, seeks damages and an injunction in respect of an alleged conspiracy to injure her.

It appears that in February, 1904, the Rev. Mr. Bailey, Presbyterian minister of Clogher, county Tyrone, having occasion to appoint a manual instructress for girls in the National School of Carntall, of which he is patron and manager, appointed the plaintiff, who is a Roman Catholic, to that position. It is admitted that she was well recommended, and well qualified. No objection has been or can be taken to her on the ground of character or capacity.

It is important at the outset to realise the nature and constitution of this Carntall National School. That is a matter which in a case of this kind may be material. The patron and manager of the school was the Rev. Mr. Bailey, the Presbyterian minister of the neighbouring congregation of Clogher. The schoolmaster, Mr. Reid, and the majority of the school children belonged to his congregation; but the school is a vested National School originally established by persons of various denominations, including Roman Catholics, and it was attended by children of different persuasions, including some Episcopalians, and, at least, six Roman Catholics. The school was not in any sense a denominational Presbyterian school supported by or belonging to any particular denomination or congregation; it was both *de jure* and *de facto* a public non-sectarian school,

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maintained with the aid of moneys voted by Parliament under the system of National Education in Ireland.

Defendant's counsel observed, and it is of course common knowledge, that where the circumstances of districts admit of it, National Schools, as regards the composition of the scholars, very frequently run on denominational lines. But every such school is open to all denominations, and is maintained by State aid only upon that basis. A substantial proportion of National Schools, including this Carntall National School, have a mixed attendance of children of different persuasions. However denominational any school of this kind may be in the actual composition of its pupils at any time, or from time to time, it is always open to all denominations. No school exists for the exclusive benefit of any denomination; and every patron and manager is free to appoint a teacher of any denomination.

In the next place it is necessary to ascertain the conditions of plaintiff's employment, which are regulated by the rules of the National Board of Education. It appears from the rules which are in evidence that her duties were to teach girls needlework, kindergarten, and similar manual exercises. I need hardly say that she had nothing to do with the teaching of religion, which, under the National system, and under these rules, is separate, and is the subject of special safeguards, the observance of which is a condition of the teacher's salary being paid by the Board. Her salary would be at the maximum rate of £24 a year, if the average attendance of girls reached twenty or more. If the average attendance of girls should be less than twenty, she would be paid a capitation grant of 5*s.* per quarter or of £1 per year for each girl in average attendance. She had nothing to do with the boys. Her duties and emoluments were confined to the girls. She would be eligible for appointment as Assistant Teacher after three years' service, if of sufficient skill and capacity. The appointment rested with the patron and manager, subject to the approval of the National Board. In the present case the approval of the National Board was given in due course. The appointment was terminable by the patron and manager by three months' notice, or without notice for sufficient cause.

I now turn to the history of the case in dealing with the facts

of which I accept the evidence of plaintiff's witnesses as substantially true. It was a matter of comment by defendant's counsel that some of plaintiff's witnesses had not been on friendly terms with defendant; that defendant appears to have been the object of some hostility as an active politician; and that one of plaintiff's witnesses was the brother of the plaintiff's solicitor. It also may involve some hardship that an action arising out of the same transactions as this one, in which the writ appears to have been issued by the same solicitor, was brought by the schoolmaster of the school, and was settled upon terms which defendant understood to include the termination of all proceedings from any quarter in relation to these transactions. The settlement of that action was pleaded as a defence to this action, but it was conceded at the trial that plaintiff was not a party to that settlement, and is not bound by it. In my opinion, the settlement of that action ought not in any degree to affect the decision of the present case. The schoolmaster's action might have been more difficult to maintain than this one, because this alleged conspiracy was directed, not against the schoolmaster, but against the plaintiff in this action. Besides, it appears from the terms of the consent settling that case that the settlement was advised and agreed to for the very special reasons set forth in the consent. After making allowance for all these matters, I see no reason to doubt the substantial accuracy of the testimony of plaintiff's witnesses. Most of them were persons of standing and position, and all of them belonged to a different faith from plaintiff. In fact, two of the principal witnesses on behalf of the plaintiff were the local Presbyterian minister and the local Church of Ireland incumbent.

It appears that, with reference to the appointment, Mr. Bailey spoke to a member of his congregation named John Robinson, who had children at the school, and Robinson made a sensible reply to the effect that he saw no objection to the appointment, as her duties were only to teach little girls to sew, and had nothing to do with religion. I infer that this man Robinson, if left to himself, would not have withdrawn his children, and I am disposed to think, from the evidence as to the way in which the boycott was procured and grew, that if they had been left to themselves the same view would have been taken by other parents

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who were afterwards induced to take part in the boycott which ensued.

Plaintiff took up her duties upon Monday, the 29th, and continued to discharge them during that week without any trouble or interference. On the following Sunday, March 6th, an incident occurred which cannot be left out of sight in considering this case. It is true that the defendant and those acting with him are not shown to have been directly responsible for it; but it can hardly be denied that their subsequent action followed it closely in point of time, was aided by the impression which it created, was not dissociated from it, and was in furtherance of the same object and purpose. When the Rev. Mr. Bailey's congregation assembled for morning service, it was seen that four large crosses, 4 feet in length, had been painted in black upon the church, one being painted on the door of the vestry which the minister must enter. Two similar crosses were painted on the National Schoolhouse. Why were those crosses painted in those places to meet the eyes of the clergyman and of the congregation on Sunday morning? I think that plaintiff's counsel was justified in asking the Court to draw the inference that they were there as a protest against the appointment of this Roman Catholic girl—as a warning to those responsible for the appointment, and as an incentive to opposition or resistance.

The minister was shocked at this spectacle, and spoke about it to the defendant, who was, and had been for eleven years, Ruling Elder of his congregation. The defendant said that he (Mr. Bailey) was the cause of it "for appointing that Roman Catholic girl as teacher"; then, said Mr. Bailey, "It is a Protestant outrage, not a Roman Catholic one." The minister and the schoolmaster, who were present at this conversation, had no recollection of hearing defendant condemn the painting up of the crosses. The defendant in his evidence deposed that he said, "I am ashamed of them. They are scandalous, but not more scandalous than your conduct towards the people of this church." That statement, if made, represents a very qualified disapproval, being almost to the effect that they were excusable under the circumstances. Defendant then told Mr. Bailey that the district was "up in arms," and that over twenty children would be withdrawn from the school.

Mr. Bailey referred to the fact that he had consulted John Robinson, and that he had no objection to the appointment. Defendant replied, "Wait until you see." Defendant closed the conversation by delaring in a loud tone that it was abominable, and that it was "the beginning of the end," by which Mr. Bailey understood him to mean that it would involve the final breaking up of the school.

As a matter of fact there does not appear to have been at that time any solid ground for supposing that parents of children attending the school had decided to withdraw twenty children. The defendant says that it was not he but a man named Johnston that made the remark about twenty children being withdrawn, and Johnston said that somebody else, whom he did not name, had told him so. I gather that the impression left upon Mr. Bailey's mind and upon that of the schoolmaster was that defendant's remarks conveyed a threat or, at all events, a prophecy that John Robinson would change his mind and that twenty children would be withdrawn. It seems very unlikely that they were both mistaken in their recollection of that conversation. However, that may be, the prophecy—whether made by Johnston or defendant—was very quickly fulfilled, and the defendant was active in procuring its fulfilment.

On the following day, Monday, March 7th, defendant summoned a meeting for Tuesday evening, March 8th, by a circular or notice which was couched in polite language, but assumed a certain tone of authority and control over the action of the persons to whom it was addressed. A copy of this notice was sent the Rev. Mr. Bailey with a covering letter inviting him to attend. The letter mentioned that some children of parents invited to the meeting had been dressed ready to go to another school. The letter conveyed that defendant was using his influence to prevent the withdrawal of children, but I gather that Mr. Bailey understood that this was conditional upon his yielding to the objection to the appointment of plaintiff. Mr. Bailey did not accept the invitation. It is, in my opinion, material to note that in his evidence he gave as one of his reasons that he did not see what good object would be served by his going to the meeting, as "it was to make him dismiss the girl, and he was resolved not to be forced to do that."

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The meeting assembled on Tuesday evening, and the minister did not come. Defendant took out a pencil and paper, and put the question to each person whether they would withdraw their children or not. He wrote down their replies. When one parent said he would not withdraw his children to another school, as he lived too far away, defendant, recognising the reasonableness of the excuse in his case, acquiesced and said he was quite right. On the other hand, having called the meeting, it was he who introduced the question of the boycott, and threw his influence on the side of the boycott. Another parent said that one of his children was too small to walk to another school. Defendant offered to give the child a lift in his conveyance, which removed the objection. More than once suggestions were made that they should delay and communicate with the minister. Defendant successfully opposed any postponement. One of those present pointed out the trivial character of the appointment and its emoluments. Defendant met the objection by a coarse jest aimed at the girl's religion. I have no doubt that the calling and holding of the meeting under the circumstances caused the withdrawal of children who would not have been withdrawn if the parents had been left alone.

Robinson, who had previously deprecated the notion of objecting to the plaintiff teaching the girls sewing, came at once into line at the meeting, and announced that he would withdraw his children. Then the putting of the question to each parent, the prevention of any delay which might allay the excitement of the moment, the writing down of the names, and the taking of a vote, procured further adherents who would not have withdrawn children if left alone. The result of this informal voting appears to have been that parents representing thirteen children were for the boycott, and ten against it. It is a matter to be noticed—as bearing on the question whether this boycott was spontaneous or was artificially procured—that, including defendant, Johnston and Robinson, the parents at the meeting in favour of the boycott appear to have represented only thirteen children. The question suggests itself, Would there have been any boycott at all if defendant had not set himself to procure and organise and maintain it? No other parents were called as witnesses except Johnston. What reason is there to suppose that other parents would have withdrawn children

without defendant's active exertions? The majority prevailed, and the boycott was adopted. There was something said about others not present who might join in the boycott, and others did join it. Although objection was taken to plaintiff's religion, there was no suggestion of any apprehension of interference with the children's faith. At the meeting nothing seems to have been said in disapproval of the crosses. The crosses and the meeting seem to have been part of the same movement. The crosses were displayed on Sunday; the meeting was summoned on Monday for Tuesday. On Wednesday and Thursday twenty-one children were withdrawn, and shortly afterwards six others, making twenty-seven, so that the boycott adopted by the votes of the parents of thirteen children resulted in the withdrawal of twenty-seven children. These included sixteen boys and eleven girls.

The total average attendance of girls at the time was thirteen or fourteen, so that plaintiff, whose duties were limited to teaching the girls, by this sudden withdrawal of eleven girls, lost all her pupils save two or three. Fortunately for her, some other girls came to the school, attracted by the appointment of the manual instructress; but she lost salary in the form of the capitation grant in respect of the girls who were withdrawn. The main question in the case is whether the defendant should be held responsible for all or any part of that loss. If the withdrawal of the children was voluntary and spontaneous, and in the ordinary course of parental duty and management, plaintiff, in my opinion, has no cause of action. But was the withdrawal of the children voluntary, spontaneous, and in the ordinary course of parental duty and management? The loss was certainly caused by the boycott, of which the defendant was the principal organiser. It was a boycott of the school; but the plaintiff was the person who was struck at through the boycott of the school. What just cause or excuse can be suggested for this attack upon plaintiff's livelihood? Was this boycott free from all illegality in its object and in its methods? No violence was resorted to, and no threat was used to any parent, but was not the boycott of the school and the consequent damage to plaintiff caused by defendant's active procurement? Was it not a serious step, and one likely to be followed by serious results, for a man of his position and influence to set himself to procure this

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young woman's dismissal without any just cause or excuse, and for that purpose to call this meeting, to send that notice and letter to this girl's employer, to put those questions all round and take down the names of each parent, to oppose delay and combat objection, and to do all this at a moment of local excitement, when the church and school were disfigured by black crosses, and the district was, to use his own words, "up in arms"? Although defendant had not been personally responsible for painting the crosses on church and school, he was joining and placing himself at the head of the movement of which that "outrage," as Mr. Bailey called it, was a manifestation.

The Court must draw its inferences as to the object of the boycott, and as to how it was maintained, from the evidence at its disposal, including the evidence of the two clergymen. It appears that Canon Haire-Forster was the Church of Ireland Incumbent of Clogher, and was also an Orangeman. He did not conceal his disapproval of defendant's action in this matter. Accordingly, we find that upon at least two occasions after the meeting of March 8th defendant took the opportunity of condemning Canon Haire-Forster, in the presence of others, for using his influence to prevent the boycott of the school. On one of these occasions, at a meeting of an Orange lodge, Canon Haire-Forster was present, and it was with evident reluctance that he gave evidence as to what occurred there. It appears that defendant brought the Canon's name before the lodge, as having been guilty of conduct unworthy of a Protestant minister and member of the lodge by aiding and abetting this Roman Catholic girl, and using his influence against the boycott of the school. The Canon on that occasion defended himself, and declared that he regarded the action of these parties, of whom defendant was one, as "an outrageous piece of boycotting," and that he would be very sorry that any of his people took part in it. He added that he did not see how a man could "denounce boycotting on one platform, and advocate it on another." Am I not justified in attaching more weight to the view of the defendant's conduct which Canon Haire-Forster took at the time and on the spot, than to the milder view that was put forward by defendant, a year after-

wards, in his evidence at the trial, and was so persuasively presented in their arguments by his counsel? Defendant's counsel represented these proceedings as a harmless and spontaneous protest; but is it not clear that Canon Haire-Forster regarded it as an organised and unjustifiable boycott? Is there not ground for the contention that the boycott was backed by intimidatory symbols, by meetings, and by speeches? Is it not clear that the boycott was directed against plaintiff, and caused her damage, and that defendant was supporting the boycott by denouncing those who opposed it? Country farmers, shop-keepers, and labourers would not, under such circumstances as have been proved in evidence, be in a position to present the same independent resistance to a person of defendant's influence as was made by Canon Haire-Forster and Mr. Bailey. They would be likely to be seriously affected by a public declaration by a man of influence who was their Ruling Elder, that a certain line of conduct was unworthy of a Protestant.

I now turn to consider more particularly what was the purpose and object of defendant's proceedings, and of the concerted action and the boycott which he organised. Was it to legitimately advance the interests and duties of defendant and others as parents and guardians, or was it to injure plaintiff? In answering that question I think I must have regard to what was said and done by defendant and others at that time, rather than to explanations offered long afterwards at the trial. In dealing with the facts I have not thought it necessary to deal specifically with certain coarse jests or remarks. I accept the version of these remarks given by plaintiff's witnesses. I do not, however, think that any of them were intended or understood in the sense of serious misrepresentations. Their only materiality seems to me to be that they help to show that the whole proceeding was directed against plaintiff mainly on account of her religion. Dislike of a particular form of religion cannot justify proceedings which require justification. It would be different if there was ground for apprehending interference with a child's religion; but I am unable to come to the conclusion that there was any apprehension, either reasonable or unreasonable, of interference with the religion of the children. We know that Robinson had no such

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apprehension, and that the parents of, at least, ten other children at the meeting had no such apprehension; and I find it difficult to regard seriously a suggestion of that kind from the witness Johnston, who was guardian of a boy at the school, to the effect that he supposed that plaintiff (whose duty only was to give manual instruction to girls) would have the duty of teaching the boys religion once a week. No other parent was called as a witness to offer any cause or excuse for what occurred. I did not understand defendant to suggest that he had any apprehension of that kind as regards his children. He excused himself by saying that he acted not solely on account of an objection to her religion, but mainly out of annoyance at the conduct of Mr. Bailey in not attending the meeting. There was also a certain element of personal feeling against the plaintiff because she had some years previously been one of several children who left this school to attend a neighbouring school under Catholic management. That migration, which was a small one, had, together with the decline of population in the locality, contributed to some extent to cause a falling off of numbers at Carntall School, and this falling off of numbers ultimately led to a Protestant Assistant Teacher losing her position. But it is not suggested that that migration was directed against the Protestant teacher, or that there was any element of boycotting or combination or illegality in connexion with it. A voluntary migration of children from a school is, I dare say, not unusual, and, if not accompanied by any element of illegality, may be quite innocent and free from legal objection.

I dare say that the motives of defendant and the others were mixed as is usual in such cases; but I have come to the conclusion that the predominant purpose and object of defendant and those acting with him was to injure plaintiff rather than legitimately advance their own rights and interests as parents and guardians. The object of the concerted action of defendant and others was understood by Mr. Bailey to be to procure plaintiff's dismissal, and I think that Mr. Bailey was not mistaken. I look to what defendant said and did at the time, rather than to his explanation at the trial. Judging by what he said and did at the time, I do not think that anything less than plaintiff's dismissal would have

satisfied defendant, or would have stopped the boycott. That object did not succeed, but one branch of plaintiff's case rests upon the wrongful character of the object of the concerted action of defendant and those acting with him. It has been contended on behalf of the plaintiff that the object of that concerted action was to do plaintiff a legal injury, and that she suffered damage thereby. I agree that the object of this concerted action was to procure plaintiff's dismissal, and that the boycott was a means to that end, and that it caused plaintiff damage. However, I am by no means of opinion that plaintiff's claim rests solely upon that view of the case. There are other and further grounds upon which, in my opinion, her claim can be supported—viz., upon the grounds that although the withdrawal of children was entirely within the right of every parent and was not in itself wrongful, parents were induced to withdraw and keep their children from the school by wrongful means in the nature of molestation and undue pressure, inducement, and influence,—directed against plaintiff's employment and livelihood, and causing her damage. That might be actionable if done by one (see *per* Lord Watson in *Allen* v. *Flood* (1) (at p. 96) and *per* Romer, L.J., and Stirling, L.J., in *Giblan's Case* (2) (at pp. 619, 620, 623)), and *a fortiori* may be actionable when carried out by one, backed by several, or by several acting together.

Upon the mere question of withdrawal of children, if there was no illegality in the objects or in the methods of inducement, I am disposed to agree with a great part of the argument of defendant's counsel. I agree that if defendant and other parents and guardians had done nothing more than withdraw their children, or agree to withdraw their children, or advise the withdrawal of children, the defendant would be in a strong position. I agree that there is no contract binding any parents to keep their children at any particular National School for the benefit of any particular teacher. If a parent or parents object to a teacher on account of her religion, or upon any other ground, they are at perfect liberty to withdraw their children, and however unreasonable their objection may appear to be, nobody has any legal right to complain of

(1) [1898] A. C. 1. (2) [1903] 2 K. B. 600.

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a voluntary withdrawal of that kind. No legal wrong is done to a schoolmaster or mistress if they suffer loss of salary, or capitation grant, or result fees, by the mere voluntary withdrawal or migration of school children. I also agree that an intolerant or even a spiteful motive would not *per se* render illegal an action which was otherwise legal. Against such motives the best safeguards, as Lord Macnaghten observed in *Allen* v. *Flood* (1), are to be found in self-interest and public opinion. But Lord Macnaghten was careful to add that his observations in that direction had no bearing upon boycotting and oppressive combination. To constrain or counteract the free play of self-interest and public opinion are among the ordinary aims of those who organise boycotting or oppressive combination. If without any just cause or excuse defendant and others struck successfully at this young woman's position and livelihood by a boycott of the school involving the elements of oppressive combination, or if he or they organised or maintained such a boycott by wrongful means and caused her damage thereby, can anybody contend that it would not be damage wrongfully done, and that they might not be liable to her in an action? If the defendant induced, and *a fortiori* if he combined with others to induce, parents to withdraw their children and to organise a boycott of the school directed against plaintiff, and if that boycott was organised and maintained by wrongful means directed against plaintiff and causing her damage, then although the withdrawal of children was in itself within the right of the parents and not wrongful, so far as they were concerned, I think defendant may be liable to plaintiff in damages, and may be restrained by the Court from a repetition or continuance of such acts. For authority, if authority be necessary, for the proposition that even a single individual may become liable for having induced others to do things not wrongful in themselves, by wrongful means directed against and to the detriment of the third party, I may again refer to what Lord Watson said in *Allen* v. *Flood* (1) (p. 96), and also to what Romer, L.J., and Stirling, L.J., said in *Giblan's Case* (2) (at pp. 619, 620, and 623).

In a case of this kind, which turns largely upon the exercise of

(1) [1898] A. C. 1. (2) [1903] 2 K. B. 600.

influence and weight of numbers, without any blow being struck or threat being used, there is room for divergence of view, and the Court must be careful neither to exaggerate nor underestimate the significance of the materials at its disposal. Indeed, in the absence of any evidence of actual violence or threats, a case of this kind can seldom be altogether free from doubt or difficulty. On the other hand, without any blow or threat, there may be persecution followed by serious loss to the object of that persecution. Upon this branch of the case the main question seems to me to be, whether the proved facts of the case justify and lead to the inference that there was on the part of the defendant, or of the defendant and others acting with him, undue interference with the freedom of will and action of others directed against the plaintiff, and causing her damage. My mind wavered in the course of the arguments, and I was greatly impressed by the persuasive way in which defendant's case was put by his counsel; but a careful consideration of the evidence has led me to the view that, under the circumstances of the case, the action of the defendant and those acting with him was directed oppressively against plaintiff, and was calculated to unduly influence, and did unduly influence, to her detriment, the liberty of action of others.

It can hardly be denied that it would, under the circumstances, be actionable for any person or persons with the object and effect of damaging the plaintiff to frighten away pupils by waylaying them or assaulting them, or threatening them or their parents. There was no physical intimidation in this case. But a sturdy adherent of a particular religious denomination might be less easily swayed by violence or threats than by impressive symbols painted on his church and school, and by a movement organised locally by a person of authority, and maintained by denunciation of opponents as persons unworthy of the creed which they professed. Defendant was not responsible for the painting of the crosses; the leaders of a boycott are often free from direct responsibility for excesses of that kind, but they may become responsible by adopting them or availing themselves of the effect which they may have produced. Defendant says that he caused the police to be informed of them. By so doing he discharged a duty to the church of which he was Ruling Elder; but so far as plaintiff was concerned

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he at once identified himself with the cause of which they were the symbols, and joined the movement directed against her of which they were the visible signs. He summoned and held his meeting, and exercised his influence immediately after the exhibition of those crosses. At the meeting he did not dissociate himself from them, and he set himself to accomplish their purpose. They were at his back, and came to the aid of his already powerful influence. Then we find him at the meeting, when dealing with persons under his influence, putting the question to each parent, opposing delay, combating objections, recording names on paper. Afterwards we find him denouncing opposition to the boycott, which he had helped to organise, as conduct unworthy of a Protestant. The defendant's conduct in this matter resembles in some degree that kind of unjustifiable molestation and interference which is referred to by Romer, L.J., in *Giblan's Case* (1) as being actionable in the case of an individual apart from any question of combination or conspiracy; but in this case there is also the further element that defendant was not acting alone. He procured the co-operation of others who acted with him; and, unless he had set himself to call the meeting and organise and maintain the boycott, he would have done little, if any, harm to the plaintiff. There is a marked difference between a spontaneous withdrawal of individuals and a sudden concerted withdrawal artificially induced and procured and directed against another; the latter can produce results which no individual can produce: its artificiality and the necessity for pressure and inducement tend to negative the notion of conscientious motive and spontaneous action.

It is not easy to define the point at which a boycott or combination becomes oppressive and illegal; all the circumstances must be taken into consideration. In the present case there was the calling of this meeting immediately after the painting up of the crosses on church and school, and the holding of the meeting in furtherance of the same cause; then there was the adoption of the boycott at the meeting by the vote of the parents of thirteen children, which procured the withdrawal of twenty-seven children; then there was the maintenance of the boycott by denunciation of

(1) [1903] 2 K. B. 600, at p. 620.

opponents of it; then there was the absence of any just cause or excuse founded upon any objection to plaintiff's character or efficiency, or upon any real or reasonable apprehension of interference with the religion of the children, or upon any right of the parents to have a teacher of any denomination appointed. When an influential man, without just cause or excuse, sets himself to procure the weight of numbers and influence to be thrown into the scale against the weaker person so as to cause loss to that person, a point may be reached where such conduct, having regard to its purpose and methods and the absence of any real justification, becomes oppressive and coercive, so as to call for the intervention of the law for the purpose of redressing the balance. In my opinion that point was reached in this case. How can a young girl, whether she be a Protestant or Catholic, on the threshold of her profession, who is trying industriously and honestly to earn her living in a public employment recognised by law, defend herself against operations of this kind unless the arm of the law is long enough and strong enough to help her? I agree with the Solicitor-General that she had no right to the attendance of a single child at the school; but she had a right to have parents left free to exercise their choice and discretion in the matter, and not to have children withdrawn by the exercise of influence unjustifiably directed against her position and livelihood, amounting, under the circumstances, to undue inducement and molestation.

Take, by way of illustration, an agrarian conspiracy to boycott, where, as here, persons may have been induced to do things not in themselves lawful with the object and effect of inflicting an injury upon a third person. Suppose the case of a person of local influence calling a meeting, putting the question of boycott or no boycott to each person, writing down names, opposing delays or opportunity for explanation, combating objection, with the result that the boycott is agreed to by a small majority, who carry the rest with them as well as others outside. In considering whether that person and those acting with him have overstepped the boundaries of lawful combination, due persuasion, and legal inducement, would it not be reasonable for the tribunal to take into consideration that in that immediate locality notice or symbols had been and were being displayed

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for the same object; that the defendant summoned a meeting immediately after the display of such symbols and in furtherance of the same purposes; that the defendant was a man of influence, occupying a position of authority towards those whom he summoned; that at the meeting no disapproval was expressed of the intimidatory notice or symbols; and that after the meeting he openly denounced those who had the power or the will to resist the maintenance of the boycott which he had helped to organise? I have very little doubt as to the inference which it would be my duty to draw in the case which I have put; and I think I ought to draw a like inference in the case before me.

Kearney v. *Lloyd* (1), which was so much relied upon by defendant's counsel, seems to me to be quite distinguishable from the present case on several grounds, *e.g.*, *inter alia*, because this National School was not a denominational institution supported by the voluntary subscription of this congregation, but a public non-sectarian school, as regards which the appointment of a teacher of any particular denomination affected no right of the defendant and those acting with him; and also because, as was noticed by Lord Lindley in *Quinn* v. *Leathem* (2), the element of undue inducement or coercion had not to be considered in *Kearney* v. *Lloyd* (1). Furthermore, in *Kearney* v. *Lloyd* (1) there was no attempted interference with the relation of employer and employed, such as existed in the present case between the Rev. Mr. Bailey and plaintiff. There was also in that case conduct on the part of the plaintiff which gave offence to the parishioners, while in the present case the plaintiff's conduct was admittedly irreproachable.

Before I conclude, I wish in this connexion to say a word upon the subject of "just cause or excuse," in so far as it may be material upon any branch of this case. In my opinion, any objection, however earnestly entertained, to plaintiff upon the mere ground that she belonged to a particular denomination would not in the present case *per se* afford just cause or excuse for any *prima facie* illegality in the object or operation of defendant and those acting with him. It would be different if the evidence showed that there were any special circumstances

(1) 26 L. R. Ir. 268. (2) [1901] A. C. 495.

in the case affecting the rights or duties or interests of parents as such—*e.g.*, a reasonable apprehension of interference with the religion of the children. Different considerations would also arise in the case of a denominational school belonging to and supported by the subscriptions of the persons raising the objections; the parents would in a case of that kind have certain rights touching the denominational persuasion of the teacher, which might go far to outweigh, or might altogether outweigh, any rights of the teacher; but in the case of a public non-sectarian school which has a mixed attendance of children of different denominations, and is supported by the State on the basis that it is open to all denominations, and exists for the exclusive benefit of no particular denomination, the parent would seem to me, in the absence of any special circumstances affecting his rights and duties as such parent, to have no right as regards the particular denomination of the teacher which would be equal or superior to the teacher's right to her position and livelihood, so as *per se* to justify wrongful acts and proceedings directed against her position and livelihood.

A further question has been raised at the trial, whether plaintiff has suffered any substantial damage; very little argument or evidence was addressed to this topic. Damages in the Chancery Division are fixed by inquiry at Chambers, and it is unnecessary at the trial to prove items and details of damage; but it is essential in an action of this kind to prove at the trial that some substantial damage was suffered by the plaintiff, and to connect that damage with the conduct of the defendant, because the actionable wrong in an action of this kind is not the intention or mental agreement, but the damage done by carrying them into execution. The perfect freedom of parents to remove their children at any time and the terms of plaintiff's employment are matters which must be kept in mind; but, in my opinion, the evidence at the trial raised a reasonable inference that parents withdrew girls as the result of defendant's unjustifiable exertions and inducements, and that in that way sufficient damage was sustained by plaintiff to render the action maintainable, and the actual damage recoverable by plaintiff can, in the absence of agreement or consent, be fixed in the ordinary course of procedure according to the measure of damages applicable to such cases by an inquiry at Chambers.

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I understand that the special remedy which plaintiff has come into this Court to seek is an injunction. I think she is entitled to an injunction. That injunction will not order defendant or anyone else to send back their children to this school, or to cause others to do so. It will merely secure that for the future the parents shall have full liberty of judgment and choice in the matter.

The order of the Court was as follows:—

"THE COURT doth declare that the defendant did unlawfully, and with intention to injure the plaintiff, agree and conspire with others, to prevent, by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to Carntall National School, in the pleadings mentioned, according to their free choice, liberty, and will; and did prevent divers persons from so doing, to plaintiff's loss and damage. And, accordingly, this Court doth order that the defendant, William Coote, be, and he is hereby, restrained from unlawfully, and with intent to injure the plaintiff, preventing, or conspiring to prevent, by undue pressure, inducement, or influence, any person or persons whatsoever from exercising their lawful right of sending, or not sending, their children to the said Carntall National School, according to their free choice, liberty, and will. And it is referred to Chambers to make the following inquiries, viz. what damages the plaintiff has sustained which the defendant ought to pay, by reason of the defendant preventing, or conspiring to prevent, as aforesaid. And it is ordered that the defendant do pay to the plaintiff her costs incurred in this action."

D. M'C. M.

Appeal. Nov. 22–24, 28, 29. Dec. 8.

The defendant appealed to the Court of Appeal (LORD ASHBOURNE, C., FITZ GIBBON, WALKER, and HOLMES, L.JJ.).

The Solicitor-General (*J. H. M. Campbell, K.C.*) and *Patchell, K.C.* (with them *Gaussen*), for the appellant:—

The conduct of the defendant and the other parents of children attending the school was perfectly legal; it was done in the exercise of their own rights in regard to the education of their children; it falls entirely short of a conspiracy to prevent by intimidation or

pressure men exercising their legal rights and carrying out their contracts. The evidence contains no suggestion of pressure, intimidation, or coercion; so far from having been coerced by Coote to withdraw their children from the school, the members of Mr. Bailey's congregation were actually restrained by Coote from so doing, for a time at least.

As long as what the defendant and the other parents did was legal, a coexisting intention in their minds to injure the plaintiff would not make their conduct actionable. It is now settled by *The Mogul Steamship Company* v. *M'Gregor* (1) that no action for conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and infringe no rights of other people: *per* Lord Lindley in *Quinn* v. *Leathem* (2).

The declaration in the order appealed from, "that the defendant did unlawfully, and with intent to injure the plaintiff, agree and conspire with others to prevent by undue pressure, inducement, and influence, divers persons from exercising their lawful right to send their children to the Carntall School," has not only no evidence to sustain it, but it is negatived by the evidence given even by the plaintiff's witnesses. Smith, who was called for the plaintiff, said in his direct examination, that the others did not ask him to join them; Adams, another witness for the plaintiff, says that when he said he would not withdraw his children, Coote said he was quite right. The uncontradicted evidence of the defendant is that he never spoke to anyone on the subject except at the meeting, and that he was even still at the time of the action driving children in his trap to the school. All the persons at the meeting, except Adams and Smith, expressed themselves in favour of withdrawing the children from the school; they went to the meeting voluntarily to express their belief that this was the very thing they ought to do. Their action was taken after free deliberation, and of their own choice. The evidence shows that up to the date of the meeting Coote was anxious to have the children kept at the school, and that his object in calling the meeting was to see if any means could be devised to keep the school together;

(1) [1892] A. C. 25. (2) [1901] A. C. 495.

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but when Mr. Bailey neither attended the meeting nor sent an excuse, Coote thought that they were treated with contempt, and declined to interfere further for the purpose of keeping the children in the school.

Kearney v. *Lloyd* (1) shows that the concerted action of the defendant with the other parents in withdrawing their children, though it injured the plaintiff, is not actionable, as it was done voluntarily and in exercise of a right.

Ronan, K.C., and *Todd, K.C.* (with them *Muldoon*), for the respondent:—

Quinn v. *Leathem* (2) is an authority that it is an actionable wrong to combine to interfere with the legal rights of another without sufficient justification or excuse. The plaintiff had a legal right to continue exercising her calling of manual instructress in Carntall School, in the employment of Mr. Bailey, without interference on the part of the defendant. The evidence shows that the meeting was organized for the purpose (as Mr. Bailey says) of compelling him to dismiss the plaintiff. That the plaintiff is a Roman Catholic is no sufficient justification or excuse for the parents combining to have her dismissed, because she gave no religious instruction. The fact that she had previously left the school is no excuse or justification, because she was at liberty to go to school where she liked. The defendant said that his reason for objecting to the plaintiff was not that she was a Roman Catholic, but such a grade of Roman Catholic that she had previously left the school to the injury of Miss Hosford, the former assistant teacher. This attack on the plaintiff, personally, is evidence of malice. The defendant manifestly used his influence to get other parents to join with him in withdrawing their children. He induced Monaghan to join in the boycott by offering to drive his children to Aughentaine.

To render an agreement or combination of several persons to injure another actionable, it is not necessary that they should proceed by undue pressure or molestation. In *Leathem* v. *Craig* (3) Lord Justice Walker says—"In my opinion, a combination or

(1) 26 L. R. Ir. 268. (2) [1901] A. C. 459. (3) [1899] 2 I. R. 744.

conspiracy to injure or cripple a man in his trade, without just cause or excuse, where damage results, was actionable before the decision in *Allen* v. *Flood* (1), and is actionable still." One man may say to another—"Do not send your child to a certain school," or "Do not deal at a certain shop," and incur no legal liability; but once the element of a conspiracy not to send children to a certain school, or not to deal at a certain shop, comes in, the liabilities are quite different. Once that element is found, acts otherwise lawful become unlawful. By reason of the concert of the parties the character of the acts is changed. *Gregory* v. *Duke of Brunswick* (2) clearly lays down that acts which would be lawful when committed by each individual separately become unlawful when there is a prior concert of persons to do them, if the acts are done to the detriment of another party. Tindal, C.J., says in his judgment—"The gist of the action is conspiracy." In *The Mogul Steamship Company* v. *M'Gregor* (3) and in *Quinn* v. *Leathem* (4) it was recognized that injury effected by a combination of many might be actionable, even though the same injury effected by the action of one person gave no cause of action. *Kearney* v. *Lloyd* (5) is wrong, and should be overruled. In that case Palles, C.B., expressly says, p. 280, that he eliminated conspiracy as part of the substantive cause of action. The case is in direct conflict with *Gregory* v. *Duke of Brunswick* (2), and was practically abandoned by the Lord Chief Baron at the trial of *O'Keeffe* v. *Walsh* (6). In that case no question as to undue pressure or molestation was left to the jury. The questions and answers which gave the plaintiff his verdict were:—1. Did the defendants, or any of them, and if so, which of them, agree to induce persons not to deal with the plaintiff?—*Yes*. 2. Did such defendants so agree maliciously?—*Yes*. 3. Did the defendants, in fact, induce persons not to deal with the plaintiff?—*Yes*. 4. If so, did such inducement cause loss to the plaintiff?—*Yes*. 5. If so, assess the damages, and damages were assessed. From the charge of the Lord Chief Baron, and from the questions which he left to the jury, it was

(1) [1898] A. C. 1.
(2) 6 M. & G. 205.
(3) [1892] A. C. 25.
(4) [1901] A. C. 495.
(5) 26 L. R. Ir. 268.
(6) Not reported.

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plain that the true view now accepted by the learned Judge was that in such actions the agreement to do an act to the detriment of another stands in the first place, and the question of malice in the second place. In other words, any concerted act done to the detriment of another is actionable, if done maliciously. *Prima facie* any act done to the detriment of another, like taking away the children from this school, is malicious. The evidence here shows that the acts of Coote, either of inducement or persuasion, were acts of retaliation; his motive was not to have no Roman Catholic teacher in the school, but to injure the plaintiff for her former desertion of the school, and to be revenged on Mr. Bailey for not coming to the meeting. Once his motives are thus ascertained, lawful excuse or justification is out of the case, and the *prima facie* presumption of malice remains in full force and effect.

In the relief granted, the judgment appealed from is right, and the declaratory portion of the order can be readily amended, if necessary.

[In addition to the cases above mentioned, the following were also referred to:—*Hutley* v. *Simmons* (1); *Giblan* v. *National Labourers' Union* (2); *Lumley* v. *Gye* (3); *Bowen* v. *Hall* (4); *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (5).]

Cur. adv. vult.

Dec. 8.

LORD ASHBOURNE, C.:—

This is an appeal from Mr. Justice Barton which really turns upon the meaning which is to be imputed to the few facts which are relevant—after putting aside circumstances which have no bearing on the issue between the parties, and should not influence the decision.

The plaintiff's claim was for an injunction to restrain the defendant from unlawfully and maliciously conspiring to injure the plaintiff in her business, and for damages. The defendant denied the imputations alleged against him, and repudiated all liability.

(1) [1898] 1 Q. B. 181.
(2) [1903] 2 K. B. 600.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.
(5) [1903] 2 K. B. 545.

The plaintiff, a respectable Roman Catholic girl, was employed by a Presbyterian clergyman, to be the manual instructress in the National School of which he was manager, at the slender stipend that would be given.

This was not pleasing to many of his Presbyterian congregation, and it appears that shortly after her employment crosses were painted or smeared outside the church and schoolhouse. This was, of course, a senseless and unbecoming outrage, and it was taken to be directed in some way against the plaintiff's engagement. There is no vestige of evidence that in act, word, or deed the defendant had anything whatever to do with these crosses, or that he had any kind of sympathy with the scandal of their use. In his evidence he entirely reprobated the occurrence. In my opinion, it would be unjust to allow the incident of the crosses to be given the slightest weight, as between the parties to this action, either in favour of the plaintiff or to prejudice the defendant.

The defendant was a Ruling Elder of the Presbyterian Church, whose clergyman was the manager who employed the plaintiff, and she accuses the defendant of unlawfully and maliciously conspiring with certain persons to injure her in the employment, which she had obtained, of manual instructress.

This is a charge which cannot be made out by the constant use of harsh epithets or the frequent use of the word "boycott."

In my opinion, the case against the defendant has to be found in the occurrences of the meeting of 8th March, and if those occurrences are put aside, there is practically but little else to be considered. On Monday, the 7th March, the defendant sent a written notice to four parents who had children attending the school, in the following words:—"Will you please attend a meeting of the parents of children to be held at the old school, Carntall, on Tuesday evening, at 7 o'clock, to consider what course we are to take? Meantime, do not send your children if at all possible to another school, and get all the parents you know of to come.—(Signed), WILLIAM COOTE." Oral notice to the same effect was given to two other parents.

The defendant deemed it right to send a copy of the notice to the manager, the Reverend Mr. Bailey, accompanied by a letter

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Lord Ashbourne, C.

in the following words. [His Lordship read the letter, *ante*, p. 75.]

I would infer from the notice and letter, as well as his previous conversation with Johnston, that the defendant's object was to try to keep the school together. The four men named in the letter to Mr. Bailey would appear to have already determined to send their children to another school, as the defendant may have known or suspected; and the reason for inviting them to attend, and not in the meantime to send their children to another school, was probably a wish to get them to consider the matter more carefully before coming to any final decision. Mr. Bailey did not attend the meeting. He did not actually receive the notice until 7 o'clock, as he was away from home when it arrived, but it is not suggested that he would under any circumstances have attended the meeting, and it is idle to speculate on what might have been the result if he had been present and taken part in the discussion. Four members of his congregation, however, Smith, Condon, Adams, and Vaughan, attended at his invitation, and were present at the meeting—which was thus composed of eleven persons. The little gathering was quite informal, without chairman, or motions, or speeches. There is practically but little difference as to what occurred. They waited some time for Mr. Bailey, and were, I believe, annoyed at his non-attendance. The defendant had said early in the proceedings that he hoped the plaintiff would not be interfered with during her time, and that he would not like to see the school injured; when it was clear that Mr. Bailey was not going to attend, John Robinson said he would withdraw his boy, and the defendant went round the other parents and asked them what they would do, and noted their answers on a piece of paper. I cannot find any importunity, or pressure, or threats. When Adams said he was not taking away his children, the defendant made no comment, and said he was quite right. It is urged that what he said to Monaghan was an inducement. Monaghan said he would take away his children, but that one of them was too small to go as far as the other school, and the defendant observed he would have him conveyed part of the way with his children. But a neighbourly offer to a man, whose intentions and sympathies have been already declared, cannot supply materials on which to

support a cause of action. There is really nothing else at the meeting specially calling for note. It is possible that if Mr. Bailey had attended and suggested some *modus vivendi*, it might have been adopted. But when he did not attend, the defendant and those who agreed with him determined to withdraw their children, possibly knowing it would diminish the fees of the plaintiff, or (it may be) thinking that if she even ceased to be instructress it would be a desirable result. Canon Haire-Forster does not add to our knowledge of what occurred at the meeting. He strongly disapproved, as he had a clear right, of the withdrawal of the children, and made no secret of his views. The defendant appears to have been annoyed at the criticism of Canon Haire-Forster, and to have expressed his opinion on the subject with much plainness and fluentness.

When examined, the real proved facts of the case are very few. Taking them without adjectives, and omitting the word "boycott," so frequently used in the argument, do they support the order under appeal? That order declares that the defendant did unlawfully, and with intention to injure the plaintiff, agree and conspire with others to prevent, by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to Carntall National School, according to their free choice, liberty, and will, and did prevent divers persons from so doing, to plaintiff's loss and damage, whereupon the Court granted an injunction and an inquiry as to damages. In my opinion, there is no evidence to support the declaration in the order. I can see no trace of any conspiracy, and no evidence of any undue pressure or inducement, or of any interference with any man's choice, liberty, or will. Mr. Ronan felt the difficulty of maintaining the declaration in the order, and suggested an alternative which, however, I do not think would be warranted by the facts or the law applicable to them.

This case seeks to strain and stretch the law much further than any decided case has as yet done, and would greatly imperil all liberty of action, and the free interchange of unfettered opinions. The question is not whether the defendant and those who held the same views were right or wrong in reference to the school in question—whether broader views might not have suggested

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different actions; but whether the defendant violated any principle of law in what he did. In my opinion, the withdrawal of the children was quite voluntary; and I can see no illegality in the object or method adopted. Mr. Justice Barton says that the parents were induced to withdraw by wrongful means in the nature of molestation and undue pressure—that there was oppressive combination—that there was a kind of unjustifiable molestation and interference. I can find nothing in the evidence to support these charges, which derive no support from his frequent reference to the crosses incident, and the constant use of the word "boycott." I think that the action of the withdrawing parents was entirely free and spontaneous—the result of their own strong wishes. I do not say whether these actions were right or open to objection; but it was their own free action, carrying out their own convictions, or it may be their prejudices, and I cannot see that the defendant in concurring with them, and in his action at the meeting, committed any actionable wrong.

If the contrary could be maintained, it would be full of peril to many. Why should anyone be exposed to litigation for acts not illegal, purely voluntary, without any evidence of threats, molestation, or pressure? Can it be suggested that a frank agreement, arrived at openly and without concealment between several parents, that each will, in reference to his children, do the perfectly lawful act of withdrawing their children from a school, by which damage results to a teacher, gives a cause of action to that teacher? The parents may have taken narrow or mistaken views; but if they acted legally, and within their rights, how can any of them be held liable by a third party who may have sustained damage by such legal actions? The case of *Pickles* v. *Bradford Corporation* (1) shows how jealously the law regards the freedom of parties to exercise all their legal rights. If the agreement is to do what is legal by legal means, the motives of the parties cannot expose them to an action, and do not require in law excuse or justification. I do not think that the plaintiff would have a right of action even if the defendant or those who concurred with him as to the removal of their children, were aware it would, to a greater or less extent, inflict damage on the plaintiff.

(1) [1895] A. C. 587.

I can find nothing in any of the numerous authorities cited which would justify our holding the contrary. The great cases of *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2), decided in the House of Lords, do not, I think, support any such view. The decision of Mr. Justice Barton seeks to widely extend the law, and, if affirmed, would lead to great interference with the legal rights of citizens, acting within the law, to take such steps as they may think right in the conduct of their own affairs. In my opinion the appeal should be allowed, with costs.

FITZ GIBBON, L.J. :—

The result of bringing this action in the Chancery Division has been that the issues of fact, as well as those of law, have been decided by a single Judge, and that we are not assisted by the findings of a jury, as the ultimate tribunal of fact, upon the most important questions in the case.

Our function, when reviewing the decision of a single Judge upon such questions, is not the same as if we were dealing with the findings of a jury. We cannot set aside a verdict if there is evidence on which twelve reasonable men could find it. In considering the opinion of a Judge, though we are bound to pay due regard to any advantages which he had from hearing and seeing the witnesses in gauging their veracity, we must review the evidence for ourselves, and we must take the responsibility of pronouncing our own judgment upon it.

The decision of the present case depends far more upon findings of fact than upon principles of law, which, as the result of many and elaborate judgments, ought by this time to be fairly settled.

The writ claims :—

(1) An injunction to restrain the defendant from *unlawfully and maliciously conspiring* with other persons to *injure* the plaintiff in her business and employment.

(2) Damages.

(3) An injunction to restrain the defendant and all other persons combining and conspiring with him from injuring the plaintiff—

(1) [1898] A. C. 1. (2) [1901] A. C. 495.

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(*a*) By unlawfully and maliciously preventing, or conspiring to prevent, pupils from attending the school of which plaintiff is one of the teachers;

(*b*) By unlawfully and maliciously inducing, and conspiring to induce, the parents and guardians of pupils to discontinue sending them to the said school, and to transfer them to a different school;

(*c*) By unlawfully and maliciously inciting, and conspiring to incite, parents and guardians to boycott the said school, and have the same closed up;

(*d*) By unlawfully and maliciously conspiring by threats and menaces to induce the manager of the said school to dismiss the plaintiff from her employment as teacher;

(*e*) By unlawfully and maliciously conspiring to injure the plaintiff in her office and employment as teacher in said school.

Lastly, an inquiry as to damages sustained by the plaintiff by reason of the *unlawful* removal of pupils and the *conspiracies* mentioned.

The statement of claim summarises the writ by praying an injunction to restrain the defendant and all others, his agents and servants, from conspiring to injure the plaintiff, and from injuring the plaintiff by a repetition of the wrongful acts complained of, and £1000 damages in respect of the conspiracy and actionable wrongs complained of.

Each paragraph alleges unlawful and malicious conduct. The word "injured" imports the infraction of legal right; and "wrongful acts" and "actionable wrongs" are the gist of the action. If this were not so, the pleading would have been demurrable under the old system; and under the new system the action cannot be maintained unless the evidence established unlawful or wrongful conduct on the part of the defendant. The statement of defence denies such conduct. It traverses the alleged cause of action, and issue is joined thereon.

Much of the argument for the plaintiff was addressed to the question whether the defendant had shown any "just or lawful excuse" for the acts proved against him. I do not enter at all upon that question. If the acts proved were unlawful, I find no evidence of excuse. If they were lawful, no excuse is needed. The defendant's counsel opened the appeal by staking his case upon the denial that he had done anything unlawful or actionable.

The finding of Barton, J., is contained in the judgment, which declares:—

> "That the defendant did unlawfully, and with intention to injure the plaintiff, agree and conspire with others to prevent, by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to Carntall National School, according to their free choice, liberty, and will, and did prevent divers persons from so doing, to plaintiff's loss and damage."

An injunction was granted against a continuance of the acts of which the defendant was convicted in these terms, and it was referred to Chambers to ascertain the damages, though the plaintiff in her own evidence assessed them at £10 as a maximum.

To sustain an action such as this, three things must be proved, each of which may be found described in the authorities as "of the gist of the action," or as "a ground of action," viz.:—

> (1) A combination of the defendant with one or more other persons for a common object.
>
> (2) Some element of wrong—of injury—*i.e.* some infraction of legal right which makes the combination unlawful.

The co-existence of these two elements is indicated by the use of the word "conspiracy"; and a combination becomes wrongful, and is rightly described as a "conspiracy," alike when the common object is unlawful, or when the means used to obtain it, *i.e.*, the overt acts, are unlawful.

In examining the authorities and in deciding this case, we must be careful not to "beg the question" by using terms which import unlawfulness. Many passages in the authorities on which Mr. Ronan has relied, can, in my opinion, be reconciled with others only by observing that wrongfulness is assumed when "conspiracy" or "injury" is mentioned.

A striking instance of prejudging the issue is to be found in the circumstance that "boycott" is the word *first used* by Barton, J., to describe the defendant's action. In his judgment "conspiracy" occurs twice, "concerted action" three times, "combination" four times, and "boycott" forty-six times. It is the shibboleth of his decision. If "boycotting" imports coercion or intimidation, the pressure of social isolation, the wilful inflic-

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tion of suffering, or interference with liberty of lawful action, it should not be applied to the conduct the lawfulness of which is at issue, until some element of unlawfulness has first been proved to exist.

(3) Pecuniary loss must result from the conspiracy before a civil action can be maintained upon it, though proof of injury—*i.e.* of the infraction of legal right—may suffice to sustain a criminal charge.

This element of loss I leave out of consideration, because I take it for granted if the acts of the defendant were actionable in other respects, loss of emolument to the plaintiff not only followed them, but was so certain to result from them, that, in my opinion, he must be taken to have intended that result. Whether this intention proves *malice*, or any wrongful motive, is a different question. The knowledge that *damnum absque injuria* will follow an act will not make it wrongful or actionable; to do that, *damnum cum injuria* must be shown (1).

What were the acts and motives of the defendant, and what were the limits of lawful action on his part? He was the father of pupils attending the National School in which the manager appointed the plaintiff to be work-mistress. The manager, teacher, and committee of the school were Presbyterians, as were the majority of the pupils and their parents. The school had previously had an attendance sufficient to obtain the services of an assistant teacher, and at that time a considerable number of Roman Catholic pupils, including the plaintiff, were on the roll.

The parish priest obtained the management of a neighbouring National School, whereupon so many Roman Catholic pupils were withdrawn from the Carntall School as to deprive it of the services of the assistant teacher, who thereby not only lost her situation after many years of meritorious service, but also lost the life pension to which a prolongation of her service would have entitled her. If the present action is maintainable, I cannot see any legal ground of distinction between the defendant's liability and that of the persons who, by concerted action, transferred their children to the school managed by the parish priest, thereby inflicting loss

(1) [1901] A. C. 537.

on the assistant teacher, far larger than that which the plaintiff suffered by the withdrawal of pupils on which the present action is founded.

We may regard the objection to place pupils under even the manual instruction of a teacher of a persuasion different from their own as unreasonable, intolerant, bigoted, if you will, but human law can not secure religious liberty unless it admits liberty to be intolerant also, so far as the limits of toleration can be fixed by the conscience of individuals.

I am satisfied that the plaintiff's appointment caused dissatisfaction to many parents of pupils of the Carntall school. Their dissatisfaction was raised to something like indignation by the aggravating circumstances that the clerical manager made the appointment without consulting the parents or committee, and that he appointed one of the very pupils whose withdrawal for sectarian considerations had deprived Miss Hosford of her place and pension.

With this feeling, up to Sunday, March 6, 1904, the defendant had nothing to do, beyond sympathising with it. On that Sunday morning a disgraceful manifestation of the same feeling appeared in the disfiguring of the meeting house and schoolhouse by the crosses which Barton, J., describes as "intimidatory symbols"; which I agree with him in regarding as "a protest against the appointment of the plaintiff," but in which there is absolutely no evidence that the defendant took part, and by which I believe him to have been honestly disgusted.

His conversations on that day with the manager, and with Johnston, manifested his disapproval of the plaintiff's appointment, and also showed his apprehension that it would result in the withdrawal of pupils, and in consequent damage to the school. His position in life, and particularly his position as a ruling elder of the congregation, naturally suggested his being asked, as he was, to take a leading part in considering what action should be taken. He, on that evening, made up his mind to invite a number of parents to a conference at the school on the following Tuesday. His letter of invitation, and his letter to the manager, show that he did his best to prevent any children from being withdrawn, pending the conference, and he did so successfully.

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He gave the manager an opportunity of coming to the conference and discussing the matter with the parents, and I see no reason to doubt either the truth or the good faith of the statements in his letter to Mr. Bailey, that, up to the meeting, he had used his good offices to do what he could to keep the place together, but that he could not, and would not, interfere further.

The dissatisfaction of the parents was inflamed by Mr. Bailey's absenting himself though sending four other persons to the conference, and keeping the parents waiting for him. With the exception of one or two of those sent by the manager, all present were parents of pupils.

The evidence satisfies me that the meeting resulted in an agreement of the majority to withdraw their children, and that the defendant was one of that majority. But there was no attempt to bind—far less to coerce—the minority by the opinion of the majority; the minority did not withdraw their children; and beyond overcoming the practical difficulty of one parent who desired to withdraw his children, caused by one of them being too young to walk to the other school under Presbyterian management, by offering this child a "lift" with his own children, nothing is proved against the defendant which led to the withdrawal of any child except his own.

If wrongfulness is of the essence of the action, as I hold it to be, there is absolutely no evidence whatever of the wrongfulness which the order under appeal makes the subject of injunction, viz.:—

> "Preventing, or conspiring to prevent, by undue pressure, inducement, or influence, any person or persons whatsoever from exercising their lawful right of sending, or not sending, their children to said Carntall National School, according to their free choice, liberty, and will."

An injunction cannot be granted against any act or conduct unless proved to have been committed, and to be likely to be continued if not restrained, and the absence of any evidence to sustain the judgment in these terms is, in my opinion, fatal to it.

I deplore the sectarian feeling which led these Presbyterians to withdraw their children from even the manual instruction of a

Roman Catholic; but knowing Ireland as I do, with twelve years experience as a Commissioner of National Education, I find as a juror, upon the evidence, that the feeling was, in the mind of every parent who withdrew his child, including the defendant himself, —if I may use medical terms of art—"idiopathic" and not "contagious." Though it was a common feeling, it was not reached by conspiracy; no action would lie against any one parent for withdrawing his child because of that feeling; it is admitted that the defendant could not be sued for withdrawing his own children; and the feeling neither originated with him, nor was it spread by any wrongful act of his, though I am satisfied that he not only sympathised with it from the beginning, but that, in the end, he fell in with the others in giving effect to it.

"Dour folk" have their rights, and in unduly limiting the exercise of those rights, people who think themselves tolerant may well say—"*Legem nosmet in ipsos sancimus iniquam.*"

It is not out of place to ask—What limit could be put to the application of any principle which would make the concerted action of these Presbyterian parents the ground of either civil suit or criminal prosecution?

What of the exercise of ecclesiastical authority, and even censure, to promote the withdrawal of pupils from "Model Schools," which differ from other National Schools only in the fact that the teachers are appointed by the Commissioners, and not by the managers, and in the Rule that in selecting these teachers, due regard shall be had, so far as possible, to the religious denominations of the pupils attending the schools?

How can the decision of Mr. Justice Barton be reconciled with the decision of the Lord Chief Baron in *Kearney* v. *Lloyd* (1), that the acts of Protestant parishioners in combining to withdraw their subscriptions to their Sustentation Fund, partly with the intention of obliging the Incumbent to leave the parish, and partly with the intention of enforcing their objection to his mode of conducting religious services, did not constitute any legal injury, and did not sustain an action for conspiracy?

Barton, J., admits that there is no contract binding parents to

(1) 26 L. R. Ir. 268.

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keep their children at any particular National School for the benefit of any particular teacher; if a parent objects to a teacher on account of his religion, or upon any other ground, he is at perfect liberty to withdraw his children, and—however unreasonable the objection may appear to be—nobody has any legal right to complain of a voluntary withdrawal of that kind. No legal wrong is done to a teacher if he suffers loss of salary by the voluntary withdrawal of school children; and "an intolerant, or even a spiteful motive would not *per se* render illegal an act which was otherwise legal."

I test the injunction by inquiring—What would happen on a motion to attach the defendant upon an alleged violation of it?

"Conspiracy" is a state of mind—no man could be attached for "conspiracy"—he could be attached only for some proved overt act. Continuing to withdraw his own children from the school is admitted to be lawful; could the defendant be sent to gaol for taking a plebiscite of parents—for giving an infant pupil a "lift" along the road to the rival school—for scolding a brother Orangeman, for calling him a "boycotter"—or for writing to the manager asking him to dismiss the plaintiff in order "to keep the school together"? Is anything more proved against him?

Apparently feeling that the evidence was insufficient to maintain the declaration on which the judgment based the injunction, viz.:—

> "undue pressure, inducements, and influence, preventing the parents from exercising their lawful right of sending, or not sending, their children to Carntall School, according to their free choice, liberty, and will"—

Mr. Ronan endeavoured to find a different ground upon which to sustain this action. Admitting that no action would lie against any one parent, or any number of parents acting independently, for withdrawing their children, even though they did so not only with the consequence, but even with the intention of inflicting loss upon the teacher, he contended that the agreement of more parents than one to do the very same thing made their action unlawful, and made each and every one of them answerable in damages—not for what they did, but for having agreed to do it.

It would be an interminable and presumptuous task to analyse the judgments of the highest authorities upon this matter, but I can find no authority or principle to support the proposition that an act may be done by each of two people without incurring any legal liability for loss consequent thereon, and yet that the same act, done in the same way, with the same intent, and with the same consequences, will be actionable, if it is done in pursuance of an agreement made between them before they do it.

The decision of the majority of the House of Lords in *Allen* v. *Flood* (1), though the opinions of the Judges of the Supreme Court were almost unanimously against it, has shown the length to which individuals can go in causing loss to others, without infringing legal right. But it was not a case of conspiracy.

The decision in *Quinn* v. *Leathem* (2) has settled the law in the case of conspiracy. It reinstated the authority of the *Mogul Case* (3); and the judgments in that case and in *Quinn's Case* (2) are now authoritative expositions of that law. The last cases upon the subject are the *Glamorgan Case* (4) and the *Yorkshire Miners' Case* (5).

It is true that several Judges, whose opinions I do not venture to criticise, have said that an individual may become liable for doing, in conspiracy with others, acts which would not be actionable if done by himself alone. But I respectfully suggest that this dangerous doctrine will be found to rest in every instance upon the introduction into the transaction, by the fact of agreement, of an element of unlawfulness which would not otherwise exist. The fact of combination, the mode of combining, and the effect of concerted action, may and often do supply evidence of malice, or of undue pressure and even intimidation; and the combination often produces damage which is of the *gist* of the action, and which the act of an individual could not produce. *The Duke of Brunswick's Case* (6) is usually referred to as an authority upon this point; but that case did not decide that an individual can maliciously interfere with the performance of an actor, thereby causing pecuniary loss to him, and not be answerable. It was

(1) [1898] A. C. 96.
(2) [1901] A. C. 495.
(3) [1892] A. C. 60.
(4) [1895] A. C. 587.
(5) [1905] A. C. 239, 256.
(6) 6 M. & G. 205.

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decided on demurrer, upon the sufficient ground that the combination was a material part of the alleged cause of action, and was not covered by the plea. The case resulted in a verdict for the defendant on the general issue, and it is not suggested that the plaintiff was entitled to a direction that a combination to hoot a man of infamous character off the public stage was necessarily unlawful, and entitled the plaintiff to a verdict.

Quinn v. *Leathem* (1), as I read the judgments, shows that, in conspiracy, the infraction of legal right, or the use of unlawful means, or the existence of unlawful motive, must be proved, over and above the facts of combination and of damage, in order to sustain a civil action. It is impossible to read the findings of the jury in connexion with the directions given to them without seeing that each defendant there had acted wrongfully and unlawfully towards the plaintiff, and would have been liable in an action, brought against himself alone, if actual loss resulted from his individual acts.

The directions to the jury are to be found in [1901] A. C. p. 500. As to the essentials of an actionable conspiracy, the jury were told, upon the meaning of the words "wrongfully and maliciously" in the questions left to them—

> "That they had to consider whether the intent and actions of the defendant went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, *including lawful combination*; or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade, through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests."

The secular arm of the law can make no distinction between securing or advancing religious or sectarian opinions and securing or advancing personal or trade interests.

Lord Halsbury (p. 508) held the charge which I have quoted to be "absolutely accurate."

(1) [1901] A. C. 495.

Lord Macnaghten (p. 510) upheld the decision in *Lumley* v. *Gye* (1)—

> "not on the ground of malicious intention—that was not . . . the gist of the action—but on the ground that *a violation of legal right* committed knowingly is a cause of action."

At p. 511 he adopted the remarks of Bowen, L.J., and Lords Bramwell and Hannen in the *Mogul Case* (2), and said:—

> "A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing when one man has to defend himself against many combined to do him wrong.
>
> "The defendants conspired to do harm to Munce, in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union."

This he held to be a conspiracy to injure—an oppressive combination—and therefore giving rise to civil liability as being "*a conspiracy to injure*, resulting in damage."

Lord Shand (p. 512) expressed his opinion that combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour. He quoted the direction with reference to the words "wrongfully and maliciously," and said that, after that direction, no other interpretation could be given to the finding that the acts complained of were done by the defendants "wrongfully and maliciously," than that the intention of the defendants was *to injure* the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests; and he held (p. 515) that the law prohibits such acts as unjustifiable and illegal.

Lord Brampton read the direction, and in substance thought it correct, though "in some respects a little too favourable to the defendants." He cited *Reg.* v. *Warburton* (page 329) to show that, in order to constitute an actionable conspiracy, the acts agreed to be done, although not necessarily criminal, must be wrongful, *i.e.*, amount to a civil wrong.

(1) 3 E. & B. 216. (2) 23 Q. B. D. 589; [1892] A. C. 60.

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Lord Lindley (p. 537) met the contention that if what was done in that case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert made no difference, by saying :—

> "One man without others behind him who would obey his orders could not have done what these defendants did. *One man* exercising the same control over others as these defendants had could have acted as they did, and if he had done so . . . he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

As to the contention that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert, he said :—

> "Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce."

He quoted the *Mogul Case* (1) as settling—

> "That no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people."

The cardinal point of distinction between such cases as the *Glasgow Fleshers' Case* (2) and the case before him, he held (p. 539) to be that—

> "In them, although damage was intentionally inflicted on the plaintiffs, *no one's right was infringed*, no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him.
>
> "Intentional damage, which arises from the mere exercise of the rights of many, is not actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set."

(1) [1892] A. C. 60. (2) 35 Sc. L. R. 645.

Lord Lindley (p. 540) concluded that part of the case by saying that, in his opinion, the direction given to the jury was correct, so far as the liability of the defendants turned on principles of Common Law (p. 540).

I cannot reconcile these judgments with the contention that the mere agreement of several persons to act in concert can make the act of any one or more of them wrongful, unlawful, or actionable, if it would not be wrongful when done by one alone, or by several, each independently of the others.

In my opinion a judgment for the plaintiff, on the evidence in the present case, would—to borrow Lord Lindley's words—be "contrary to the well-settled principles of our English Law, and not yet authorised by any statute or legal decision."

Furthermore, in my opinion, it would involve intolerable restrictions upon the exercise of parental and religious feelings, which judges must regard as none the less lawful because they may think them narrower or stronger than their own.

WALKER, L.J.:—

I do not take the same view of this case as my colleagues. I do not know that we differ as to the law, and I should be sorry in any way to extend the doctrine under which combination of workmen in trade union cases has been held actionable. I leave out of consideration cases where the overt acts of conspiracy have been such as were proved in *Quinn* v. *Leathem* (1)—namely, threats to injure—that masquerade under the name of persuasion. The question seems to me one of fact, but to apply the facts I may state what I believe in cases of combination the law has established. I think if Coote entered into an agreement or combination with other persons mentioned to injure the plaintiff by bringing about her dismissal from the post she lawfully held, and, in pursuance of that concert and for the effecting of its purpose, intentionally did acts causing damage to her, this conduct would be actionable unless there were just cause or excuse for it. Lord Macnaghten, in *Quinn* v. *Leathem* (1), said:—"Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give

(1) [1901] A. C. 495.

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rise to civil liability, even though the end were brought about by conduct and acts which of themselves, and apart from the element of combination or concerted action, could not be regarded as a legal wrong." An intention to do an act which is to the detriment of another by infringing some right of the other is a "malicious" act. That is the language that the Lord Chief Baron takes as his guide in the Tallow case. It is the keynote of his now celebrated charge. Was there a deliberate agreement or concert to injure the plaintiff, resulting in damage to her, for which the defendant is not excused? I do not purpose to go at length into the facts. I shall merely give an outline of them in their nature and import (as I infer them to be). There was a school at Carntall under Mr. Bailey, a Presbyterian clergyman—a mixed school—but most of the children were Presbyterians. There was another school at Ballyscally—a National School—of which the Roman Catholic clergyman was manager, and it had gradually become, as is usual in these schools, a denominational one. The girl, Rose Sweeney, had been at Carntall school some five years before as a pupil, and she moved to Ballyscally, as she said herself, to help the average of the assistant-teacher there, as the teacher's salary depended upon that. She came from Ballyscally school and received some instruction which qualified her according to the certificate of Reid, the schoolmaster; and then Mr. Bailey, the Presbyterian minister, nominated her, and the nomination was sanctioned by the National Board, as a manual instructress in the Carntall School, that is to teach children to sew. She had nothing to do with religious teaching, and if she volunteered to do it, it was outside her duties. As Robinson said to Mr. Bailey, "Oh, who would think about that for teaching little children to sew?" The appointment was made on the 29th February, and on the 6th March, someone—as Coote said to Mr. Bailey, some "fool of a Protestant"—resented his view of the appointment by painting crosses on the school and church. Coote came to the church on Sunday morning, and Mr. Bailey and he had a conversation; and Coote attributed the outrage that had occurred—and I believe honestly so—to the Roman Catholic appointment, and not consulting the feelings of the people before he appointed a Roman Catholic. Mr. Bailey

says Coote told him twenty children would be withdrawn. Johnston says he told that to Mr. Bailey, and Coote says that when he got home, Johnston used the words, and then that he said, "It was a pity; can something not be done?" I draw my own inference, which I am at liberty to do, and which is different from that of my colleagues. I interpret it that the alternative was the dismissal of the girl. The next step was the sending out of the notices by Coote, and the sending of the letter to Mr. Bailey. [His Lordship read the letter, *ante*, p. 74.] That was written to Mr. Bailey. I think that both he and Mr. Bailey understood, and I draw the inference, that the solution would be the dismissal of the plaintiff.

The meeting was held, and different accounts have been given as to Coote's action on the occasion, and the extent to which he was a promoter or only a sharer in what took place. I infer he was looked up to as the Ruling Elder, and apparently the most influential person in the district. Mr. Bailey did not attend the meeting; and it is suggested his not going led to the withdrawal of the children, either as a protest against his not going, or because, if he had gone and talked it over, he would have persuaded the persons present to acquiesce in the appointment of Miss Sweeney. My inference is he did not do so, because he felt if he went her dismissal would be made a *sine qua non*. Well, six parents came there on the invitation, written or oral, of Coote, and the next day twenty-one children left the school. My impression is Coote took the leading part. He wrote down the names of those to withdraw. He overcame the difficulties of Monaghan by offering to send his children in his trap. I do not accept his statement, "I am sorry to say there are thirteen children to be taken away," when I find him next day withdrawing his three children, and giving reasons totally inconsistent: first, that it was a protest against Mr. Bailey not coming to the meeting; second, that he was taking them away in any case in the month of May, that is three months afterwards. He tells us he appealed to them as a Protestant, and as she was a Roman Catholic that he hoped some agreement would be come to that she would not be interfered with during her time in the school. But in the same breath he told them that he did not believe in her appointment; that she was of a different faith,

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and had been one of those who had left the school and driven out the second teacher. She was such a grade of Catholic that she could not stay at the school as a "pupil." On the 25th April, according to Mr. Bailey's evidence, Coote said, "How can I be charitable to a man whose action compels me to send my children away to a school at a distance?" He gives an explanation of that which I cannot accept. He says, "If he had been charitable and had come to the meeting, it would have been all right. He replied, "I treated your meeting with contempt." The inference which I draw from the whole of the evidence is that on account of Mr. Bailey having exercised his right to appoint this Catholic girl to teach children to sew, a combination was formed between the 29th February and the 8th March, in which Coote was the chief mover and actor, to have the girl dismissed, and they adopted the means of injuring her by withdrawing their children, to punish Bailey, and to injure the plaintiff; that they intentionally did this to injure her in her position, and did injure her; and I cannot find such just cause or excuse for their action as would entitle them to damage her without compensation; in other words, they did her, by their combination, a legal wrong. They infringed the right of Miss Sweeney by the combination to work out her removal. It was more than the mere exercise of the right of a parent to withdraw his children from a school, which may not be malicious in the legal sense. It was a determination to get this sewing mistress out because she was a Catholic; and I cannot find just cause or excuse for the combination. It is in this, I think, that the question before us is one of fact on which I have formed my view. I think the judgment of Mr. Justice Barton, as far as it goes, is right; and as to the result I do not think that an inquiry was necessary to measure damages, and I also think that the injunction should be limited as Mr. Ronan suggested; but I do not see my way to concur in the dismissal of the action. As my view cannot affect the result, I have indicated my reasons very shortly.

HOLMES, L.J.:—

The judgment appealed from contains a declaration that "the defendant did unlawfully, and with intention to injure the plaintiff, agree and conspire with others to prevent, by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to Carntall National School, according to their free choice and liberty; and did prevent divers persons from so doing to plaintiff's loss and damage." Counsel for the defendant admit that if this declaration can be sustained, the plaintiff would be entitled to some relief in this action, although such relief might take a different shape from that given by the judgment; but they contend that the declaration is not only not supported by proof, but that it is inconsistent with the testimony of the plaintiff's own witnesses. As I have myself come to this conclusion, I propose before referring to the law to examine the evidence with the view of showing that it is impossible to extract from it the inference drawn by Mr. Justice Barton.

It is difficult to keep the trial of an action like this free from irrelevant topics; and although there is not much to complain of in this respect in the present case, there have been some matters treated at considerable length, which, in my opinion, need no more than the briefest reference. Nor have we to deal with evidence flatly contradictory, which is always melancholy, and sometimes puzzling. Variances, no doubt, there are; but they do not arise from intentional untruth on either side; and they have but small bearing on the material issues. A great deal has been said about the defendant's position and influence in the district, but there is little or no evidence on these points, and I am of opinion that this part of the case has been exaggerated. He is described in the writ as an auctioneer; and we have been told that he is in the Commission of the Peace, and has been elected a County Councillor. I gather that if he is well thought of by some of his neighbours, he is not popular with others; and that he resembles, in this respect, many men of his class who have a fluent tongue and a taste for local politics. He has been frequently referred to as the Ruling Elder of his church; and it has been assumed that this gives him a pre-eminent position. The mistake is excusable, as the description is somewhat misleading; but, speaking of what

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is common knowledge to those who are interested in these matters, I cannot forget that according to the law and doctrine of the Presbyterian Church, all Elders are on an equality, but that in the allotment of duty, some are Teaching Elders—that is to say, the ministers, and some are Ruling Elders, who take part in the government of the Church, and of whom there are several in every congregation, selected, I believe, on account of the apparent propriety of their lives. The controversy that has led to this action began with the introduction into Carntall National School of the plaintiff as manual instructress and kindergarten teacher. National education in Ireland, although legally non-sectarian, has, by the wish of the people, gradually become denominational, and Carntall may be called a Presbyterian School. Mr. Bailey, its manager, is the local minister, the master is a Presbyterian, as have also been the other teachers mentioned in the course of the case (except the plaintiff), and the bulk of the pupils. There are at present a few young Roman Catholic children in attendance; and three or four years ago there were more; but the majority of them were then withdrawn for the purpose of their being sent to a school of their own faith, with the result that the school roll fell below fifty, the number required to entitle the manager to employ an assistant teacher. In consequence of this, Miss Hosford, who had held the position for over twenty years, was obliged to retire without a pension—a circumstance which caused a bitter feeling amongst the parents with whom she was popular. After Miss Hosford left, Miss Vaughan became manual instructress; and when she passed into the Training College, Mr. Bailey was obliged to look for someone to succeed her. He fixed on the plaintiff, who, on his nomination, entered upon the duties of manual instructress on Monday, the 29th February, 1904. He seems to have suspected that her appointment would not be popular by reason of her religion, and he says that he had previously spoken on the subject to John Robinson, whom he describes as an extreme man, who made no objection. There is, however, no doubt that the news that the plaintiff was to succeed Miss Vaughan excited a strong feeling of resentment in some of the parents; and that during the first week of March there was much hostile criticism of the action of Mr. Bailey. The primary cause of this anger was the girl's

religion; but it was intensified by the fact that she was one of the pupils taken away from Carntall in Miss Hosford's time. I have no doubt that the defendant shared in this feeling. His personal interest in the matter was small, inasmuch as, for reasons into which it is unnecessary to enter, he had already determined to remove his children in the following May; but he recognised that the school was an important adjunct to the congregation, and he was much annoyed that the minister had not consulted the committee of the Church, before nominating the plaintiff to the vacant post. But, although I am satisfied from what occurred on Sunday, the 7th March, that this was the mental attitude of the defendant, there is not evidence that before that day he let his views be known by either word or act.

On the morning of the 7th March, the congregation on arriving at the church found that four large black crosses had been painted thereon and two on the schoolhouse. There was probably not one of them who did not know of the excitement in the district during the previous week, and that this outrage was the work of some fool of a Protestant (to use the defendant's words) carried away from all sense of propriety by indignation at the action of the minister. The only person who seemed not to have understood it and to have been taken by surprise was Mr. Bailey himself. It sometimes happens that the last to hear of a matter of common knowledge in a locality is the person most interested in knowing it; and unless I am to hold, as I do not, that the minister was insincere in his interview with the defendant on this Sunday morning, he then learned for the first time the state of feeling amongst several of his hearers. There is no substantial difference in the evidence as to what then occurred between them. The defendant, speaking with the directness characteristic of men of his class and type, said that Mr. Bailey was himself responsible for the angry excitement that had shown itself in the disgraceful use of the emblem of the Christian's faith. He told him that children would be withdrawn from the school, and although I am disposed to think that the number twenty was mentioned not by him but by Johnston, I do not consider this material. The important point is that his evidence contains nothing tantamount to an admission that he had stimulated angry feeling, nor is

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proof of this supplied from any other quarter. I observe that this incident of the crosses is referred to again and again by Barton, J. If it were shown that the defendant was party or privy to it, I should deem it of importance; but so far from being satisfied of this, I am convinced that the defendant had nothing to do with it. I should require clear evidence that a person in the position of the defendant was guilty of such conduct; and, in the absence of all evidence, I regret that Mr. Justice Barton should convey that he hesitates to acquit him of it. With these observations I pass away from the crosses. There are only two points in what occurred on the Sunday between Mr. Bailey and the defendant relied on in support of the plaintiff's case. The one is that, according to Reid, the schoolmaster, the defendant said that many people were wanting him to hold an indignation meeting; but up to that time he had held no meeting; and the assembly of the following Tuesday bore, as I shall presently show, no resemblance to such a meeting. The other point is also to be found in Reid's evidence. He swore that Mr. Bailey said that he had been talking to John Robinson about the appointment, and that he approved of it and talked of sending back his girls to the school, to which Coote replied, "Wait till you see." A more harmless observation under the circumstances it is difficult to conceive. Robinson had not sent back his girls, and he was unlikely to do so. His views had undergone a change, and he had been probably talking of removing his son, for, according to the evidence of Robert Smith, he was the first person at Tuesday's meeting to declare, without being asked, that he would withdraw his boy; and so strong was his indignation, that he has never attended Mr. Bailey's church since that evening. In fact, in the statement of claim, he and a person called Alexander Smitten are named co-conspirators with the defendant to induce the parents to discontinue sending pupils to the school. It is not likely that the defendant, who remained a member of the congregation, would have much influence with a man of such a decided mind. I come now to the first interference on the part of the defendant of which there is any evidence—the calling together of a few of the parents on the 8th March. Mr. Justice Barton seems to have thought that the defendant's object in this was to break up the school.

The inference I draw from the evidence is that his object was to keep the school together. What had been seen and heard on the Sunday must have left little doubt in any intelligent mind that the school was in danger; and the defendant had good reason to believe that several pupils would be withdrawn at once. If he desired this to happen, he had only to let things take their course; but this was not his wish. He walked from church for some distance with James Johnston, and the two men agree substantially as to what then occurred. Mr. Ronan would have us reject this evidence altogether. He makes Johnston the co-conspirator instead of John Robinson, and the mysterious Smitten, of the pleadings.

But the account given by them harmonizes with what followed, and is probable in itself. As Johnston and the defendant walked together, the former mentioned that he had told Mr. Bailey that he was informed twenty children would be leaving next morning, including his own boy; thereupon the defendant said that it would be a pity to disturb the congregation and the school, and asked could not something be done, to which Johnston replied, "Nothing can be done." "Well," said the defendant, "it is a pity." They then parted; but the defendant still thinking that some effort ought to be made to keep the pupils together, determined to ask a few of the parents to meet and discuss the matter. That this was Coote's motive is shown by what he did. On Monday morning he wrote to four of them, and sent the letters by a messenger. It is to be noted that each of these men had already resolved to take away their children at once. Johnston had said so the day before; John Robinson was the extreme man already referred to, and the two others—Robinson, of Glen, and J. Steen—had their children ready to go to another school when the messenger arrived. The evidence for this last-mentioned fact is the statement in Coote's letter to Mr. Bailey—a statement which has not been challenged, and which, if untrue, would not have been made to a gentleman who was asked to meet Robinson and Steen on the following evening. I am satisfied that the defendant believed, or strongly suspected, what these men intended to do; and that his reason for inviting them and telling them not to send their children in the meantime to another school, was

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the hope that they might be persuaded to alter their intention. The only other persons asked by Coote to come to the meeting were John Scott and Thomas Monaghan, who were orally invited. As soon as the defendant ascertained that some parents would attend, he wrote to Mr. Bailey so that he might have also an opportunity of coming and discussing the matter with them. He added, "I have used my good offices up to the present to do what I can to keep the place together, but I confess I cannot and will not interfere further," that is as I read the words, beyond calling and attending the meeting. And here it is natural to inquire by what means the defendant expected or hoped to effect the object I have attributed to him. He says himself that as the plaintiff had begun work, and as, in the ordinary course of her education, she would be going to the training college in about two years, he did not want her dismissed. He might perhaps have been satisfied if Mr. Bailey promised that in future appointments he would consult the church committee; but it is also possible that he may have contemplated her immediate dismissal as the result of the meeting, in which case the children would have been left at the school. I cannot speculate upon what would have followed from a discussion that did not take place; nor is it material to do so. It is enough for my purpose to show that the parents were invited with an honest intention, and that there is no ground for describing their coming together as an indignation meeting. The letter written to Mr. Bailey reached his house early on the afternoon of Tuesday; but, in consequence of his absence from home, he did not actually receive it until about seven o'clock. This would still have given him time to reach the place of assembly; but he did not go, probably for the reason that the nomination of the instructress rested with him as manager, and he thought that the committee of the church or the parents ought not to interfere. He had, however, asked some members of the congregation to attend—Smith, Adams, Condon, and Vaughan; and thus there were eleven persons present; the defendant, the six parents invited by him, and the four persons sent by Mr. Bailey, two of whom had children at the school. What took place is deposed to by Smith and Adams, called by the plaintiff; and by the defendant and Johnston, on the other side. They agree substantially in their

testimony. There seem to have been none of the features of an ordinary public or semi-public meeting. There was no chairman, no speeches, and no resolutions. Smith says that when he arrived they were all talking about various matters (Q. 459); they were discussing various general matters not connected with the appointment (Q. 520). They were, in fact, waiting for the minister, and while so waiting there was a desultory conversation going on, in which I have no doubt there were some references to the subject that brought them together. The defendant admits that he referred to the plaintiff as one of those who had left the school and driven out the second teacher, Miss Hosford. He also says that he expressed a hope that some agreement would be come to that the plaintiff would not be interfered with during her time at the school; and Adams swears that Coote said that he would not like to see the school injured. Whilst conversation of this kind was going on in a desultory way, the defendant and the persons invited by him were waiting for the minister. Although Smith, Adams, and Condon had reason to believe that he would not come, they did not say so; and Vaughan, who arrived about 7.45 p.m., gave the first definite information that he would not attend. This announcement, coming at such a time and in such a way, made the defendant as well as those whom he had invited very indignant. It emphasized the feeling, already in their minds, that their minister was treating them with indifference, if not contempt; and I cannot conceive anything more calculated to irritate Ulster Presbyterians. According to Smith, what followed was (Q. 559), "First of all, John Robinson said he would withdraw his boy; and then Coote went round all the others and asked them what they would do." I think that this was preceded by something that Smith probably did not hear, or did not remember. The defendant says (Q. 700), I apologised for Bailey's absence; and Johnston said, "I am very sorry you brought us here at all," and added he would take away his boy in the morning. Then, according to Johnston (Q. 880 and 881), the defendant advised him to hold on, and not to take his boy away, but he refused. I infer from this that Coote, although indignant with the minister, still hoped that the pupils might not be withdrawn, and that it was only when Johnston rejected his remonstrance, and when Robinson declared his inten-

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tion, that he saw that it would be impossible to keep the school together. He then asked those present, except Smith and Vaughan, who had no children, what they were going to do, and noted on a piece of paper their answers. He used no word of persuasion, importunity, or threat, and save when he told Adams that he was quite right in not withdrawing his children, he made no comment. The only occurrence at the meeting which is relied on against the defendant was that Monaghan, having at first replied that he would take away his children, and having said afterwards, that one of them was too small to go to the other school, Coote observed that he would have him conveyed part of the way. This seems to me to have been merely a friendly offer to a man determined to send his other children elsewhere, to provide that the youngest should not be separated from the rest.

There are one or two matters in the evidence which I shall mention lest it may be thought that I have overlooked them; but I do not consider any of them material. Smith says that at the meeting the defendant speculated as to whether Wilson and Donaghy would withdraw their children; but there is no proof that he ever spoke to either of them on the subject, and in point of fact no child named Donaghy was taken away, while one Wilson had left before the meeting, and two others a month later. The Haire-Forster episode throws little light on the case. The Canon regarded the withdrawal of the children as an outrageous piece of boycotting; and he said so to Coote and others, whereupon Coote denounced him for so describing what had happened, and defended the action of himself and the other parents.

No argument can be founded on the settlement of Reid's action. The recital in the consent shows that it was entered into to prevent scandal and to promote peace; and it is within the experience of counsel that clients are often willing or induced to give some money to stop suits which they would probably win if proceeded with, but the public trial of which would cause family bitterness or other unpleasantness. I have now dealt with everything in the evidence that is relied on by the plaintiff; and what does it come to? Six parents, whose children had been at Carntall School, and who, for reasons adequate or inadequate, were likely

to remove them, met together on the invitation of the defendant to discuss the situation with the patron and manager. That gentleman did not attend, whereupon each of them said they would take away their children, and the defendant, who up to that time was anxious to find some way of keeping the school together, determined to join his friends in their intended action. Where is there in this an agreement to prevent by undue pressure, inducement, and influence, divers persons from exercising their lawful right of sending their children to the school according to their free choice, liberty, and will? Can the name of a single person who was so interfered with be suggested? The declaration in the judgment, so far from being consistent with, is contrary to all the evidence in the case. Mr. Ronan, the leading counsel for the plaintiff, admitting this, asks us to strike out the declaration from the judgment, and to substitute for it something else. But unless I am prepared to hold that a purely voluntary agreement by two or more persons that each of them will do a lawful act from which some damage results to a third party may give a cause of action to such third party for the damage thus arising, no change that can be made in the judgment will help the plaintiff. Mr. Ronan's proposition, as I understand it, is that such an agreement as I have mentioned would be actionable and probably criminal, unless there is justification or excuse for entering into it.

Before accepting this view of the law, at least to the extent to which it was pressed by Mr. Ronan, I should be obliged to examine the authorities more fully than it is necessary to do in a case in which, in my judgment, the question does not arise. I may, however, say that, as at present advised, I see no reason for doubting the soundness of the views expressed so clearly by Fitz Gibbon, L.J. In the present case there was no conspiracy, combination, or agreement, in any sense in which I can understand those words, entered into on the only occasion on which the defendant interfered in relation to the school. He had asked on that occasion six parents who had already either actually, or almost, resolved to withdraw their children, to come together in the hope that on consultation with the minister they might be led to change their minds. This hope was not realized. The parents adhered to their intention already formed; and the only change in the situation resulting

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from the meeting was that the defendant himself, who had not, I think, up to that time come to any determination as to his own children, who were to leave in any case in May, resolved to take them away at once.

I wish it to be understood that I decide this case on its facts, which are wholly different from those of any other reported case on this branch of the law, and which, in my opinion, fail to maintain the plaintiff's action.

Solicitor for the plaintiff: *Joseph Smith.*
Solicitor for the defendant: *E. V. Hamilton.*

G. Y. D.

ARNOTT *v.* ARNOTT (No. 2).

(1905. No. 800.)

M. R.
1905.
Nov. 10.

Will—Charity—"Religious purposes"—Scotch law.

A testator bequeathed to his trustees a sum of money, upon trust to invest it and apply the income for such religious purposes as his trustees and the Bishop of C. for the time being should, in their uncontrolled discretion, think fit. By a clause in the will immediately preceding this bequest the testator bequeathed a like sum of money to his trustees for the benefit of such charitable institutions connected with the counties of C. and D. as his trustees and the Bishop of C. for the time being should, in their uncontrolled discretion, think fit, irrespective of creed:—

Held, that the words "religious purposes" meant religious purposes which were charitable, and that the bequest was not void for uncertainty.

Grimond v. *Grimond* ([1905] A. C., H. L. Sc., 124) is a decision upon Scotch law, and does not affect the rule laid down in *White* v. *White* ([1893] 2 Ch. 41), and earlier cases, that a bequest for a religious purpose is *prima facie* a bequest for a charitable purpose.

ADJOURNED SUMMONS.

Sir John Arnott, of Woodlands, Cork, Baronet, by clause 8 of his will, dated August 11, 1897, bequeathed to his trustees the sum of £20,000, free of legacy duty, upon trust that his trustees should invest the same, and apply the annual income thereof for the benefit of such charitable institutions in, or connected with, the city or county of Cork, as to £10,000, and the county and city of Dublin as to £10,000, as his trustees and the Protestant Bishop of Cork for the time being should, in their uncontrolled discretion, think fit, irrespective of creed.

By clause 9 the testator bequeathed to his trustees the sum of £20,000, free of legacy duty, upon trust that his trustees should invest the same, and apply the annual income thereof for such religious purposes as his trustees and the Protestant Bishop of Cork for the time being should, in their uncontrolled discretion, think fit. By clause 10 the testator empowered his trustees to postpone payment of legacies for twenty years after his death, interest at 4

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per cent. to be paid on them meantime. By clause 11 the testator devised and bequeathed his real and personal estate to his trustees, upon trust, for sale, and to hold the proceeds, after payment of debts and legacies, upon trust, as to one-third for his wife during widowhood, and subject to appointment by her for all his children by her living at her death or second marriage, and the issue of any deceased child in equal shares, and as to one other third upon trust for his eldest son, John; and as to one other third for all his children living at his death, other than his eldest son, in equal shares. By clause 13 the testator provided that the shares of residue given to any son of his should be invested, and the income only paid to such son till he should die, or assign, or incumber, or attempt to assign or incumber, the same, and in such event should be applied for the benefit of such son and his wife and issue, in the discretion of the trustees, and in default of wife or issue, in favour of the other or others of his children, with a power to accumulate, and an ultimate gift on the death of such son upon such trusts as such son should by will appoint.

By codicil to his will, after reciting that by clauses 8 and 9 of his will he nominated the Protestant Bishop of Cork, for the time being, with his trustees to be the persons according to whose discretion the application of two legacies of £20,000 each for charitable and religious purposes, respectively, was left, the testator revoked the appointment of the Protestant Bishop of Cork, for the time being, and, in lieu thereof, appointed the Rev. Canon Harley to be the person, with his trustees, according to whose discretion the legacies under clauses 8 and 9 of his will should be applied.

The testator died on March 28, 1898, and his will was proved on April 13th, 1898, by his widow, Emily Jane, Lady Arnott, and his eldest son, John Arnott, the executrix and executor therein named, who were also appointed trustees of the will. The persons interested in the testator's residuary estate, at the date of his death, were the following:—His widow, the defendant, Lady Fitzgerald Arnott (1), his sons, the plaintiffs, Sir John Arnott, and David T. Arnott, and his daughters, Rosina Johnson and Margaret Arnott,

(1) On the 20th September, 1902, Emily Jane, Lady Arnott, by royal license, assumed the additional prefix surname of Fitzgerald.

now Margaret Rowden, children by his first marriage; and his sons, Loftus Percival Arnott, Maxwell Arnott, and Mangerton Arnott, and his daughters Jessie Arnott, Lily Arnott—now Lily Rogers—Florence Arnott, Mary Mabel Arnott, and Emma Arnott—now Emma Bloomfield—children by his marriage with the defendant, Lady Fitzgerald Arnott. Mangerton Arnott died on December 16, 1901, and his will was proved by the defendants Leslie A. Johnson and William Morrogh. Mary Mabel Arnott was an infant.

By the last clause in his will the testator directed that if a question of difficulty arose, touching the carrying into effect of the trusts of his will, the same should be submitted by his trustees for the decision of the Chancery Division of the High Court of Justice in Ireland.

Interest at 4 per cent. on the said two sums of £20,000 was applied, year by year, by the trustees for the benefit of charitable institutions and religious objects pursuant to the will.

On March 6, 1905, in *Grimond* v. *Grimond* (1) the House of Lords held, reversing the decision of the Second Division of the Court of Session, that where a testator directed his trustees to divide portion of the residue of his estate to and among such "charitable or religious institutions and societies as they might select," the bequest was void for uncertainty. Sir John Arnott was advised that if the decision in that case was of general application and not confined to Scotch law, it made the validity of the bequest in clause 9 doubtful, and that it was, therefore, desirable to take the opinion of the Court thereon.

A summons was accordingly taken out on behalf of Sir John Arnott, as plaintiff, to determine whether the bequests in clauses 8 and 9 of the will were valid.

The defendants to the summons were Lady Fitzgerald Arnott and the persons interested in the residue, already mentioned, and the Attorney-General as representing charities.

The summons was adjourned into Court.

(1) [1905] A. C., H. L. Sc. 124.

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Ronan, K.C. (*Matheson, K.C., Gordon, K.C.*, and *Gerald Fitz Gibbon*, with him), for the plaintiff:—

Grimond v. *Grimond* (1) does not apply. It is a decision upon Scotch law. The opinion of Lord Halsbury is expressed in general terms; but he adopts the judgment of Lord Moncrieff, the dissenting Judge in the Court below (2), which is based on the law of Scotland as to charitable gifts, which differs from the law of England: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3); *Blair* v. *Duncan* (4). It has always been held in England that a gift for a religious purpose is, *prima facie*, for a charitable purpose: *Baker* v. *Sutton* (5); *Townsend* v. *Carus* (6); *Wilkinson* v. *Lindgren* (7); *White* v. *White* (8). The word "charitable" is used in clause 8 of this will, and the word "religious" in clause 9; but these words are not antagonistic. Clause 8 deals with charitable institutions in two particular places; clause 9 with religious purposes generally. The reference in the codicil to clauses 8 and 9 does not affect the meaning to be placed upon the words "religious purposes." In *In re Allen, Hargreaves* v. *Taylor* (9), decided since *Grimond* v. *Grimond* (1), Swinfen-Eady, J., treats that case as applicable to English law, and distinguishes it.

O'Connor, K.C. (with him *M'Cann*), for the executors of Mangerton Arnott, deceased, trustees for an infant:—

Lord Halsbury in *Grimond* v. *Grimond* (1) meant only to uphold the judgment of Lord Moncrieff in the Court of Session, which was based on the difference between English and Scotch law and referred to *White* v. *White* (8). According to the former, a religious purpose is, *prima facie*, a charitable purpose; according to the latter, it is not. Therefore I am forced to admit that *Grimond* v. *Grimond* (1) has not altered the law of England on the subject. The only question is, whether in this will the word

(1) [1905] A. C. 124.
(2) Counsel referred to a printed copy of the judgments contained in the proceedings in the House of Lords, since reported—[1905] A. C. 603.
(3) [1891] A. C. 531.
(4) [1902] A. C., H. L. Sc. 37.
(5) 1 Keen, 224.
(6) 3 Hare, 257.
(7) L. R. 5 Ch. 570.
(8) [1893] 2 Ch. 41.
(9) [1905] 2 Ch. 400.

"religious" is used in contradistinction to "charitable." It does not occur in clause 8, where the word used is "charitable." I cannot contend that clause 8 is void; but unless the words "religious purposes" in clause 9 are confined to charitable purposes, the gift in that clause must fail for uncertainty. The uncontrolled discretion given to the trustees favours the view that the testator meant to distinguish between charitable and religious purposes. Would it be a breach of trust if they applied part of the income to a religious but non-charitable purpose? The codicil refers to the gifts in clauses 8 and 9 as "for charitable and religious purposes respectively." *White* v. *White* (1) is the final authority that a gift for religious purposes is, *prima facie*, a gift for charitable purposes. In the other cases cited in that case, viz. *Baker* v. *Sutton* (2), *Townsend* v. *Carus* (3), and *Wilkinson* v. *Lindgren* (4), the testator intended to impose a charitable purpose.

The Attorney-General (*Right Hon. John Atkinson, K.C.*) and *Cecil Atkinson*, for the Crown:—

It is admitted that a gift for religious purposes is, *prima facie*, charitable, and that it is not enough to say that there may be religious purposes which are not charitable: *Townsend* v. *Carus* (3). It was urged that as the gifts here were in two separate clauses of the will, the testator must have intended to distinguish between two purposes, charitable and religious. But the gifts here are not for charitable and religious purposes; the gift in clause 8 is for charitable institutions in particular places. That in clause 9 is for religious purposes not restricted as to area. The words used in the codicil cannot affect the gift. In the cases where the words "charitable or religious" were used the testator used the word "charitable" in the popular, and not in the legal, sense. In *Townsend* v. *Carus* (3) the words were "for the benefit or advancement of such societies, subscriptions, or purposes having regard to the glory of God, in the spiritual welfare of His creatures, as they shall in their discretion see fit." In *Wilkinson* v. *Lindgren* (4) the words were "to divide

(1) [1893] 2 Ch. 41.
(2) 1 Keen, 224.
(3) 3 Hare, 257.
(4) L. R. 5 Ch. 570.

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amongst the different institutions (already named), or to any other religious institution or purposes as they may think proper." In both these cases the gifts were held good. In *Blair* v. *Duncan* (1), a Scotch case, the words were "such charitable or public purposes as my trustee thinks proper." There the word "public" was held to be too vague, and the gift was declared void for uncertainty.

The Solicitor-General (*Campbell, K.C.*), *Herbert Wilson, K.C.*, and *O'Shaughnessy*, for the defendant Lady Fitzgerald Arnott and her adult children, supported the argument of the Attorney-General. They referred to *Ellis* v. *Selby* (2) and *In re Piercy* (3). [THE MASTER OF THE ROLLS referred to *Richardson* v. *Murphy* (4).]

M'Cann, in reply:—

In *Wilkinson* v. *Lindgren* (5) there is nothing in the judgment of Lord Hatherley as to the vagueness of the gift. He held that "any other religious institution or purposes" meant "any other religious institution or religious purposes." In *Blair* v. *Duncan* (1) the word "religious" did not occur. In *White* v. *White* (6) the Court arrived at the decision with difficulty, and it should, therefore, not be extended. In that case no discretion was left to the trustees—a scheme was directed. If there is no obligation on the trustees to apply the fund for charitable purposes, the gift fails for uncertainty: *Morice* v. *Bishop of Durham* (7); *James* v. *Allen* (8); *Hunter* v. *Attorney-General* (9), where the law is laid down by Lord Davey, at pp. 323, 324. That principle applies here. *Ellis* v. *Selby* (2) is in favour of our contention; the gift there was for "such charitable or other purpose" as the trustees should think fit, and was held void for uncertainty. Shadwell, V.-C.,

(1) [1902] A. C. 37.
(2) 7 Simon, 352.
(3) [1898] 1 Ch. 565.
(4) [1903] 1 I. R. 227.
(5) L. R. 5 Ch. 570.
(6) [1893] 2 Ch. 41.
(7) 9 Ves. 399; 10 Ves. 521.
(8) 3 Mer. 17.
(9) [1899] A. C. 309.

there says that the testator had expressly drawn a distinction between charitable and other purposes.

THE MASTER OF THE ROLLS:—

The question arises on a very long will, which is parcelled out into a number of different numbered paragraphs. It turns on two of these paragraphs, numbers 8 and 9. The division of the will into paragraphs was merely for convenience; it does not affect the construction of the will any more than as being a number of sentences, each self-contained. The gift would be simple enough, but for the use of the word "religious" in paragraph 9, which does not appear in paragraph 8. Paragraph 8 is as follows:—"I bequeath to my trustees the sum of £20,000, free of legacy duty, upon trust that my trustees shall invest the same, and apply the annual income thereof for the benefit of such charitable institutions in, or connected with, the city or county of Cork as to £10,000, and the county and city of Dublin as to £10,000, as my trustees and the Protestant Bishop of Cork for the time being shall, in their uncontrolled discretion, think fit, irrespective of creed." These munificent gifts of £10,000 each are given to charitable institutions connected with Cork and Dublin. These are to be selected according to an uncontrolled discretion given to the trustees in conjunction with the Protestant Bishop of Cork; but this uncontrolled discretion only means that in the selection of the institutions their discretion is not to be subject to control. It does not purport to give them any power to go outside the trust itself, which is for charitable institutions in these places. On the bequest in paragraph 8 there is nothing to be said, though it is brought before the Court on the present application. The difficulty arises in connexion with clause 9. It is as follows:—"I bequeath to my trustees the sum of £20,000, free of legacy duty, upon trust that my trustees shall invest the same, and apply the annual income thereof for such religious purposes as my trustees and the Protestant Bishop of Cork for the time being shall, in their uncontrolled discretion, think fit." The one gift is for charitable institutions in particular places; the other is for religious purposes which may be irrespective of any religious institutions; but the discretion of the trustees, though uncontrolled,

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is to be exercised within the terms of the trust. Taking it, first, as if paragraph 9 stood alone, Mr. M'Cann's argument would be equally applicable, that there are many religious purposes which have been held to be not charitable—for example, masses not directed to be said in public. But what is the meaning to be attached to the words "religious purposes"?

There is no doubt that, acting on the principle that the law desires *ut res magis valeat quam pereat*, it has been held that into the word "religious" must be previously imported the word "charitable," *i.e.* that they must be religious purposes which are charitable, and that, *prima facie*, they must be so restricted. If it were not so restricted, and if it were left at large, then the principle of *Morice* v. *Bishop of Durham* (1) would be applicable. I referred to this in *Richardson* v. *Murphy* (2), where I said, and adopt it as part of my judgment now—"As to the other ground put forward, viz., that the gift is void for uncertainty on the principle of *Morice* v. *Bishop of Durham* (2) and other cases, they do not decide that a gift to a trustee with power of selection among charities is not a valid charitable gift. They only decide that where money is given for charitable and other, even philanthropic, purposes, so that it would be open to the legatee, without departing from the words of the instrument creating the trust, to spend the whole of the money for charitable or philanthropic purposes, or partly for one and partly for the other; then, if the legatee intended to apply the whole in philanthropic or other non-charitable purposes, and the gift transgressed the ordinary rule as to perpetuity, it would be void, as no one can tell whether the purpose expressed in the clause is a charitable one or not, and the gift is void." The residue there went to the Archbishop of Dublin. That principle does not apply to cases in which the word "religious" stands alone, for "religious purposes," *prima facie*, mean charitable purposes, unless controlled by the context. In *White* v. *White* (3), and in the three cases there cited, it was held that a gift for religious purposes and no more will be construed by the Court as confined to such religious purposes as are in their nature charitable.

Mr. O'Connor admitted that this was good law at present.

(1) 10 Ves. 521. (2) [1903] 1 I. R. 227. (3) [1893] 2 Ch. 41.

but a case in the House of Lords of *Grimond* v. *Grimond* (1) was mentioned, in which it was laid down, in circumstances very like those in the present case, that where a discretion was given to trustees, the whole thing was void as being vague. But the first answer to that is that *Grimond* v. *Grimond* (1), no matter how conclusive it may be, was a decision on Scotch law in a Scotch case. That, of course, again must be qualified by this—that no distinction appears to have been drawn, in the House of Lords, between the law of Scotland and the law of England on the subject. But the House of Lords was sitting as a Scotch Court. There is no question as to that. Indeed, it can be shown that the House of Lords was dealing exclusively with Scotch law, because both the Lord Chancellor and two of the other Law Lords referred in terms to, and practically adopted, the judgment of Lord Moncrieff in the Scotch Court (2); and, on reading the judgment of Lord Moncrieff, pointing out certain differences between the law of England and the law of Scotland on that point, it is plain that he decided it as a question of Scotch law. Therefore, I take it that the judgment of Lord Moncrieff may, to that extent, be incorporated as a statement of the law applicable to the case into the judgment of the House of Lords. Mr. O'Connor properly said that that case does not, and cannot, control the present case. Therefore we are left to this—that if paragraph 9 stood alone, I must give to these words "religious purposes" the meaning which will connect therewith charity, and make them charitable. But, of course, that result may be controlled by the context, from which it may be shown that the testator used the word "religious" in a different sense, and, therefore, paragraph 8 was referred to where the gift was for "charitable institutions." But if the two paragraphs, instead of being separated by numbers, were in one, I think that the meaning of the will, without doing violence to any case, and following entirely the principle of *White* v. *White* (3), would be this, that the first £20,000 is given to be administered to charitable institutions, and the second £20,000 is given for religious, that is, *prima facie*, charitable purposes, the selection of which is reserved to the discretion of the trustees themselves. If that is so, then the

(1) [1905] A. C. 124. (2) [1905] A. C. 607. (3) [1893] 3 Ch. 41.

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will stands all together, and there is no inconsistency between the two gifts. Therefore, if there was nothing but the will, my decision must be in favour of the validity of this bequest. The second codicil was, however, referred to, in which the following passage occurs:—"Whereas, by my said will, clauses 8 and 9, I nominated the Protestant Bishop of Cork for the time being with my trustees to be the persons according to whose discretion the application of the two legacies of £20,000 each, for charitable and religious purposes, respectively, was left, I hereby revoke the said appointment of the Protestant Bishop of Cork, for the time being, and in lieu thereof nominate and appoint the Reverend C. B. Canon Harley to be the person, with my trustees, according to whose discretion the said legacies under clauses 8 and 9 of my will shall be applied." That is only a reference to clauses 8 and 9 of the will, and does not affect the meaning of clause 9. There is, therefore, no explanatory context in the will or codicil on which I could hold this gift to be void. I must, therefore, hold that both the gifts are good. The only thing which remains to be said is that, in my opinion, it was a proper case to be brought before the Court. It was the duty of the plaintiff to bring it, and the parties must have their costs out of the residue.

Solicitors for the plaintiff: *Casey & Clay.*

Solicitors for the defendants, Lady Fitzgerald Arnott and children: *O'Connor & Dudley.*

Solicitor for the executors of Mangerton Arnott: *William Morrogh.*

Solicitor for the Crown: *Sir P. Coll.*

W. L.

IN RE GALWAY'S ESTATE (1).

Appeal.
1905.
Nov. 15, 16.
Dec. 1.

Land Purchase Acts—Request by Land Commission for particulars—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37)—*Jurisdiction of Land Judge—Boycotting.*

Where a request has been made under sect. 7 of the Irish Land Act, 1903, to the Land Judge by the Land Commission for particulars of an estate as to which an absolute order for sale has been made, it is mandatory on the Land Judge to supply the particulars mentioned in sect. 7 to the Land Commission.

If compliance with the request would endanger a pending sale, or would appear to the Land Judge to prove useless, the Land Judge can, in the exercise of his discretion, postpone taking action on the request until the Land Commission has been informed of the circumstances of the property, and has an opportunity of judging whether proceedings taken under sect. 7 are likely to prove effective; but the Land Judge cannot, in exercising his discretion, take into consideration the fact that the lands have been boycotted.

APPEAL from an order of Ross, J., dated the 18th May, 1905, by which it was ordered that no further steps be taken in pursuance of a request for particulars preferred by the Estates Commissioners under section 7 of the Land Act of 1903, and that the solicitor having carriage should forthwith proceed to bring the unsold lands to a sale in the usual way.

The petition for sale was presented on the 11th January, 1884, and the conditional order for sale was made absolute on the 12th March, 1884. The lands were posted for sale on the 27th April, 1887; but, owing to insufficient bidding, the sale was adjourned. The lands were subsequently offered for sale from time to time by private offer; and in April, 1891, the lands of Lisduff and Aghlora, part of the estate situate in the county of Mayo, were sold by private offer for the sum of £3250, which was applied in payment of incumbrances. The lands remaining unsold consisted of the lands of Cloncha in the county of Galway, portions of which, viz. 155A. 2R. 14P. were held under fee-farm grant,

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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subject to a rent of £32 6*s.* 2*d.*, and the residue, containing 621A. 1R. 27P., were held in fee-simple.

The rent payable by the tenants—eighteen in number—amounted to the yearly sum of £66 10*s.* 5*d.*, and the poor law valuation of the residue of the estate (other than the house and demesne which were in hands) was £25 10*s.*; the poor law valuation of the house and demesne was £128. The demesne lands and lands in hands up to about 1902 yielded annually about £126; but for the last three years the lands had been boycotted, and only a small rent of about £50 annually had been received. On the 20th January, 1905, a proposal was made to the solicitors having carriage, by Lord Ashtown, to purchase the lands of Cloncha for £3510, subject to the rent and tenancies, and requesting them to bring the offer before the Court. In February, 1905, a request was sent by the Estates Commissioners to the Land Judge, under section 7 of the Land Act, 1903, asking to be furnished with particulars respecting the estate, viz. a rental, particulars of tenanted and untenanted lands, the surveyor's report, a map, a copy of the last receiver's account, and a certificate of valuation.

On the 7th March, 1905, the proposal of Lord Ashtown was brought before the Land Judge for directions, and notice of the application was served on the tenants and the Land Commission, when Ross, J., directed the case to stand for the rental to be brought up to date, and for a declaration that the estate was not within section 40 of the Land Act of 1896. On the 16th March, 1905, an order was made declaring that section 40 did not apply. There was no receiver over the lands, there were no incumbrances unpaid, and the offer of Lord Ashtown was approved of by the owners. The other material facts are fully stated in the judgment of FitzGibbon, L.J. On the 13th May, 1905, the solicitors having carriage applied for an order that no further steps be taken in pursuance of the request of the Estates Commissioners, and Ross, J., made the order. Some of the tenants appealed.

Healy, K.C., and *D. F. Browne, K.C.*, for the appellants:—

In matters of this kind the Land Commission and the Land Judge are the same, and are so treated in some portions of the

Land Purchase Acts, and the Land Judge cannot refuse to furnish the particulars requested by, practically, the same body.

It was held in *Owen's Estate* (*No.* 1) (1) that the provisions of section 40 of the Land Act of 1896 were mandatory, where the conditions mentioned in section 40 exist. If there was no discretion in *Owen's Estate* (*No.* 1) (1), there is none here. The jurisdiction is vested alone in the Estates Commissioners to request the particulars, and they alone have the discretion given to them to ask for the particulars. The Land Judge was bound to comply with their request to enable the Estates Commissioners to exercise the further discretion vested in them by the subsequent sub-sections of section 7 as to advancing public money. In such cases "may" will be read "shall" in the construction of an Act of Parliament where public rights are involved: *Reg.* v. *Tithe Commissioners* (2); *Julius* v. *Bishop of Oxford* (3); *Nichols* v. *Baker* (4).

If boycotting existed on this estate, the appellants had nothing to do with it, and it has not been proved that they had. But the Land Judge had no power to take that into account at all: that was entirely for the Estates Commissioners.

Jellett, K.C., Oulton, K.C., and *A.C. Meredith*, for the parties having carriage:—

The contest was between a sale under section 7 of the Land Act of 1903, and a sale under the Landed Estates Court Act, section 55. Ross, J., adopted a sale in his own Court, and that meant that he refused to consider any other. He was bound to sell to the best advantage, and having got an offer, not only of a substantial nature, but what appeared to be the full value, which was approved of by the owner, and everyone interested, the Land Judge refused to jeopardize that offer by postponing the matter until the Estates Commissioners made up their minds as to what they would do. *Julius* v. *Bishop of Oxford* (3) and *Nichols* v *Baker* (4) do not apply, because in those cases there was a public duty to be performed; and it is only in such cases that it has been held that "may" ought to be read "shall."

(1) [1897] 1 I. R. 200.
(2) 14 Q. B. 459.
(3) 5 A. C. 214.
(4) 44 Ch. D. 262.

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Dec. 1.

George Green, for Lord Ashtown.

Fitz Gibbon, L.J. :—

This is an appeal by certain tenants of portion of the lands for sale in the matter against an order of the Land Judge, made on May 18, 1905, upon the motion of the solicitors having carriage, by which it was ordered that no further steps be taken in pursuance of a request of the Land Commission made to the Land Judge for particulars respecting the estate for sale, which request recited that it appeared to the Estates Commissioners expedient to take steps with a view to the purchase, for the purposes of part 1 of the Land Act, 1903, of the lands remaining unsold in the matter.

The same order directed the solicitors having carriage to proceed to bring the lands to a sale "in the usual way."

This order, under the circumstances of the case, seems to portend a conflict of jurisdiction between the Land Judge and the Land Commission, and it is important in view of the relations between those tribunals under the Land Acts, especially having regard to the Land Act, 1896, section 23, which provides that the Land Judge shall be deemed to be an additional judicial Commissioner of the Land Commission, and that regulations may be made for the mutual relations between the Land Judge, on the one side, and the Land Commission, on the other.

The estate has been in the Land Judge's Court for nearly twenty-two years. To understand the difficulty which has now arisen, it is necessary to state the title and the proceedings.

The estate originally consisted of the lands of Cloncha, in the county of Galway, which are still unsold, and of certain lands in Mayo. Part of Cloncha, containing 135 acres, was held in fee-farm at a rent of £32 6*s.* 2*d.* The residue of Cloncha, containing 621 acres, and the Mayo lands, were held in fee-simple.

William Thomas Galway, the owner, died on September 6, 1861, having, by his will dated August 8, 1861, charged an annuity of £150 for his grand-nephew, Robert Holmes, and certain legacies, on all the lands, which were already subject to a mortgage for £3000. He devised the estate to trustees, subject to the annuity, and to the head rent and taxes, in trust for his wife for life, and after her death, which occurred on June 18, 1883, he

directed the trustees to sell and dispose of the lands *at the highest price that could or might be had for them*, and to stand possessed of the proceeds upon trust, after payment of the costs of sale, the mortgage debt, and the legacies, to invest and hold the balance in certain shares for Robert Holmes and his children, and for his sister Jane Hill, and the children of his sister Mary Hinds, deceased.

On January 11, 1884, the trustees of the will presented a petition to the Land Judge for a sale of the entire of the lands, and an absolute order for sale was made on March 12, 1884. The rental was settled, and the estate was posted for sale on April 27, 1887; but owing to insufficient bidding, the sale was adjourned.

On April 29, 1891, the Mayo lands were sold; and out of the proceeds the mortgage debt was paid, except a balance of £92 1*s.* 3*d.*, which was afterwards paid out of rents received. The trustees, of whom the petitioner, E. C. Villiers, is the survivor, have continued in possession and receipt of the rents of the unsold lands until now.

The Galway estate of Cloncha was lot 1 upon the rental of 1887; it then consisted of a mansion-house and 520 acres of land in the owner's possession, valued in all at £250 a-year, and 237 acres occupied by agricultural tenants at a total rental of £85 5*s.* 8*d.* In the final notice to tenants, served on July 10, 1905, the land in hands is described as containing 540 acres. The tenanted lands, containing 215 acres, adjoin the lands in possession of the owners, and are now held by seventeen tenants from year to year, at a total rental of £66 10*s.* 5*d.* In an affidavit of the solicitor having carriage, filed on March 2, 1905, it is stated that up to about two or three years ago the lands in hands yielded annually about £126; but that for the last three years the lands have been boycotted, and only about £50 annually has been received for them for grazing.

In 1902, Mr. Villiers instituted a suit at the Rolls, to have the trusts of the will carried into execution; and a decree for administration of the real and personal estate of W. T. Galway was made in that suit on April 24, 1902.

The object of the motion upon which the order now under

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appeal was made, as stated by counsel, was to secure the acceptance of an offer of Lord Ashtown and his trustees, to purchase the estate, and to prevent the acceptance of that offer from being interfered with by proceedings taken by the Land Commission under the Act of 1903, section 7.

Lord Ashtown's property is the subject of a Chancery suit for administration pending before Barton, J., who, on December 12, 1904, made an order giving liberty to the trustees of the will of the late Lord Ashtown to concur with the present Lord in making an offer of £3510 for the purchase of the lands of Cloncha, being lot No. 1 in the printed rental of the estate for sale in this matter, subject to the conditions of sale stated in the rental; and, in the event of such offer being accepted by the Land Judge, he ordered the Accountant-General to pay £2840 cash to Lord Ashtown's trustees, they undertaking to apply it as part of the purchase-money. Presumably Lord Ashtown was to provide the balance of £670.

On January 20, 1905, the solicitors for Lord Ashtown delivered an offer of £3510 accordingly to the solicitors having carriage in this matter, with a request to bring that offer before the Land Judge for acceptance.

On February 14 the Master of the Rolls made an order in the Galway administration suit giving liberty to Mr. Villiers to accept the Ashtown offer. The further proceedings, to which I shall presently refer, have, therefore, been taken with the concurrence of the Master of the Rolls, Barton, J., and the Land Judge, at the instance of the owners and intending purchasers, and throughout those proceedings no regard has been had to any intention of the Land Commission to purchase the estate.

The request of the Land Commission mentioned in the order under appeal bears no date except " February, 1905." It does not appear upon whose initiative it was made; it is signed by the secretary of the Land Commission, and it was filed in the Land Judge's Court on February 6. On February 8, six days before the order of the Master of the Rolls, it was notified to the solicitors having carriage in this matter. The Land Judge's Registrar reports that it "reached the Land Judge's Court on some

day between the 3rd and 6th February," and it came, he believes, by post. No further mention of it appears in any document until the notice of May 13, on which the order under appeal was made. It recites that it appears to the Estates Commissioners expedient to take steps with a view to the purchase for the purpose of part 1 of the Land Act, 1903, as an estate, of lot 1 of the Galway estate, the lands of Cloncha, containing 757A. 0R. 1P.; and it requests the Land Judge to cause them to be furnished with the particulars respecting the said estate described by rule 25 of their provisional rules, dated October 23, 1903—viz. a rental, particulars of tenanted and untenanted lands, surveyor's report, map, copy of the last receiver's account, if any, and a certificate of the valuation.

The grounds of the decision of the Land Commission that it was expedient to purchase this "estate" do not appear.

On March 2, 1905, the solicitors having carriage served notice upon, amongst others, the solicitors for the tenants and the Land Commission, of a motion before the Land Judge for directions as to the Ashtown proposal. This motion was grounded on an affidavit of the solicitor having carriage, stating the circumstances of the estate, the Ashtown proposal, and the Rolls order of February 14, and it exhibited a letter from the petitioner, giving his reasons for considering the offer a good one. The request of the Land Commission was not mentioned.

The motion was heard on March 7. No formal order was made up, but the following minute of the proceedings appears in the Registrar's Court note-book—

> "Mr. Oulton, of counsel for the owners and petitioners, moves to accept proposal of trustees of Lord Ashtown to purchase lot 1 on rental for £3510. Mr Browne, K.C., of counsel for the tenants. Mr. Brady, of counsel for Lord Ashtown's trustees. Mr. Walker, of counsel for *cestuis que trustent*. Mr. Reginald Holmes sworn and examined; cross-examined by Mr. Browne, K.C. Stands for rental to be brought up to date, and to have a declaration that estate is outside 40th section."

On March 10, a further notice was served by the solicitors having carriage, on the tenants, the Land Commission, the Congested Districts Board, and others, of an application to the Land Judge to consider and determine whether the conditions mentioned in the Land Act, 1896, sect. 40, sub-sect. 1, applied to the estate

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ordered to be sold in the matter, and for an order declaring that the said conditions did not apply. This application was grounded on an affidavit of the solicitor having carriage, giving particulars of the estate, stating that an offer had lately been received and would be submitted to the Court in due course; that the rental was about being re-settled in order to have it brought down to date; that a receiver had not been appointed over the lands in any Court, and there were no incumbrances now unpaid; and that the petitioner was the surviving trustee of Galway's will.

This affidavit showed that the estate was not so circumstanced that it would, independently of the Act, be sold without the consent of the owner as to price; and on March 16, on hearing counsel for the petitioners, the tenants, and the beneficiaries, an order was made declaring the provisions of the Land Act, 1896, sect. 40, inapplicable to the lands for sale.

The request of the Land Commission was not mentioned in the notice, affidavit, or order, and the following proceedings have since been taken in furtherance of the Ashtown sale, and without regard to that request.

On July 3, an order was obtained from the Master of the Rolls, in the Galway administration suit, appointing the residuary legatees to represent the children or representatives of the testator's sisters, and thus all the beneficial owners of the estate were brought before the Court. The consolidated final notice to tenants was issued on July 10, and duly served and vouched. On October 25, it was certified that no objections had been received, the lands in hand were valued, and the settlement of the rental was proceeded with before the Examiner, on October 26, and November 7; and on November 10 the rental was "finally settled for private offers."

Thus every preliminary to the acceptance of the Ashtown offer seems to have been completed between March 18 and November 10, 1905.

Meantime, parallel to, but never touching, these proceedings, the proceedings which resulted in the order under appeal, and the proceedings on this appeal, have been going on. Though notice was served on the Land Commission, and the tenants attended and were heard before the Land Judge, when the orders of March 7 and 16

were made, nothing was done to give effect to the request of the Land Commission, and no appeal was taken against any of the orders made for the purpose of proceeding upon the Ashtown offer.

Beyond suggestions at the Bar, we do not know how the proceedings upon the request of the Land Commission originated. On May 13, the solicitors having carriage served notice upon all parties of an application that the request be not complied with, and that the sale of the estate be proceeded with according to the course of the Court. This was grounded on an affidavit of Thomas Mason, who, in June, 1902, had taken part of the lands for grazing. It detailed threats, boycotting, and intimidation, to which he alleged he had been subjected since June, 1902, and it ended—

> "I am still a grazing tenant on the said lands, and at present there are seven policemen stationed in Clooncah House to protect my stock and herd."

Another affidavit was made by Reginald Holmes, who deposed that he was absolutely entitled to a moiety of the lands, and to the balances due on foot of some of the legacies charged thereon by Galway's will—that in 1902 and 1903 he resided in the mansion-house of Clooncah, that the police were there, and that the lands were "strictly boycotted," and he gave evidence of intimidation and threats directed against Mason's herd. He referred to the Ashtown proposal, and he stated that, in his opinion, it should be accepted, as all persons interested in the proceeds of the sale of the lands were quite satisfied with it. He stated, *on information and belief*, that since the date of that offer the Estates Commissioners had sent in a request requiring to be furnished with particulars of the estate, with a view to sending in an offer for the lands, and he submitted that "*for the reasons aforesaid* particulars should not be furnished to the Estates Commissioners, and that the offer of Lord Ashtown's trustees should be accepted without further delay." He also stated his opinion that any offer the Estates Commissioners might make would not be equivalent to the cash offer of £3510 for the lands by Lord Ashtown's trustees, this offer being to purchase the entire land now for sale as in the rental. The Land Commission would have to redeem the head rent and

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other superior interests, in addition to out-bidding the Ashtown offer, and time, trouble, and money, would have to be spent in bringing the request to the point of a definite offer, if the Land Commission, on learning the circumstances of the estate, should make any offer at all. We cannot now speculate as to what might have happened if the request had been pressed. It lay dormant from February 4 until the solicitors having carriage stirred it up by their notice of May 13.

In our opinion this motion was misconceived. Under the orders made in March the rental was being revised, and the proceedings required to complete the Ashtown sale have all the time been going on regularly and without interruption. When the request was received in February it ought to have been acknowledged, and the Land Commission ought to have been informed of the proceedings upon the Ashtown offer, and of the circumstances which rendered it unlikely that steps towards a purchase by the Land Commission, if begun then, could prevent the Ashtown sale.

If this had been done, the Land Commission could have seen whether there was any likelihood that it could offer a higher price, and the Land Judge might have considered whether the pending proceedings could be stayed on the chance of a better offer, without imperilling the Ashtown sale. If the Land Commission had even asked for a reply to its request, the two tribunals might have come to an understanding. But nothing was done, save that the owners brought the derelict request before the Land Judge on May 18, and asked for an order that it be not complied with.

The Registrar's note shows that on that day counsel for the tenants asked leave to examine witnesses who were in attendance. Their evidence was offered to prove that the lands were not boycotted, or at least that the tenants were not parties to the boycotting; the Registrar notes that counsel declined to argue that sect. 7 was mandatory, or that the Land Judge had no discretion in the matter.

Four witnesses on behalf of the tenants, and Mr. Villiers on behalf of the owners, were examined and cross-examined. We have no report of the proceedings or judgment, except the newspaper report used at the Bar, which may be incomplete, and in

some respects inaccurate; but it shows, and counsel have conceded here, that issue was joined about the boycotting, that evidence about it was treated as relevant to the functions of the Land Judge, and that in making the order under appeal he claimed a discretion to refuse the information required by the Land Commission, and assumed jurisdiction to review the action of the Commission in making the request, and he held that public money ought not to be advanced to effect a purchase, under section 7, of an estate upon which he found that "a conspiracy" existed to prevent any person other than tenants from dealing with or purchasing either tenanted or untenanted lands.

The order under appeal gives effect to this view. It purports to prevent the Land Commission from taking steps towards a purchase which it considers to be expedient for the purposes of the Act of 1903, and it contrasts such a purchase with what it describes as "a sale in the usual way."

This order, in our opinion, rests on a confusion of the functions of the two tribunals. The duty of the Land Judge is defined by the Landed Estates Court Act, and in the case of a solvent estate it is the duty of selling the property to the best advantage. By the settled practice of the Court in selling such an estate, due regard should be had to the wishes and opinions of the owners. But the Land Judge cannot refuse to permit steps to be taken by the Land Commission for the purpose of purchasing any estate which that Commission thinks it expedient to buy for the purposes of the Act of 1903. The first of these steps, in the case of an estate for the sale of which an absolute order has been made, is to apply in the prescribed form to the Land Judge for the information specified in the rules.

In our opinion the provision of sect. 7, entitling the Land Commission to request such information from the Land Judge, is an enabling provision, and *prima facie* it is the duty of the Land Judge to give it effect. On the other hand, the Land Commission cannot, by merely delivering a request, effect a *stet processus* upon proceedings of the Land Judge which have already, with the concurrence of the owners, or as in this case with the sanction of the Chancery Division, brought the sale of a solvent estate to another purchaser almost to completion.

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In such a case, or where compliance with the request would endanger a pending sale, or would, from circumstances within his knowledge, appear to the Land Judge to be likely to prove useless, he, in our opinion, has and ought to exercise a judicial discretion in postponing action upon the request until the Land Commission has been fully informed of the circumstances of the estate, and has been given the means of judging whether steps taken under section 7, are likely to prove effective. But he cannot unconditionally and absolutely forbid the Land Commission to take any steps, nor on his own judgment decide that the Commission ought not to purchase, nor can he allow his discretion to give or refuse the prescribed information to be affected by considerations of the propriety of the purchase by the Land Commission, as distinguished from considerations of the mode of selling the estate to the best advantage.

In the present case, the notice of May 13, and the order of May 18, appear to us to have opened an enquiry, and to have been based upon evidence, immaterial to the proper discharge of the Land Judge's duty, and transgressing the limits of his jurisdiction. The notice ought not to have been served, and "no rule" should have been made upon the motion, without prejudice to the pending proceedings upon the Ashtown offer, or to the possibility of obtaining an offer from the Land Commission, if obtainable with advantage to the estate, either as being for a larger price, or in the event of the Ashtown sale falling through.

For these reasons, we must discharge the order of May 18, but, having regard to the present position of the matter, we find ourselves unable now to make any affirmative order in substitution for it.

I have already mentioned the inaction of the Land Commission and of the tenants from February 4 to May 18. The subsequent course of proceeding in this Court is material. The appeal was not set down until June 27. It was ripe for hearing on July 1. Owing to the absence of the Judges on circuit, this Court did not sit until July 20; but the appeal was listed for hearing on that day. When it was called, counsel appeared for both parties, and, without opening the case, jointly applied that it should stand over until October.

As an interlocutory appeal it would have been heard on the second day of these sittings, but on the previous day counsel requested that it should be listed with the Final Appeals, on the ground that it involved an important question.

It was not reached until November 15, almost six months after the order under appeal was made, and nearly ten months after the request of the Land Commission had been sent to the Land Judge.

During all that period, at the Rolls and in the Land Judge's Court, the proceedings towards completion of the Ashtown sale were going on, and time, labour, and money were spent which would be lost if the first step towards a purchase by the Land Commission were now taken; if it be taken, there is no certainty that a higher price would ultimately be obtained; and there is a certainty that trouble and expense would be caused, and that the Ashtown sale would be seriously delayed, if not endangered, and all this in the case of an unincumbered estate, and against the will of the owners.

We are not justified in making any affirmative order under such circumstances. If the Ashtown sale should fall through, or be further delayed, or if the Land Commission should think fit to proceed with its request, the discharge of the order under appeal will leave all parties free to take such action as they may be advised.

As to costs, the tenants were in our opinion wrongly brought before the Land Judge on May 18. *Harenc's Estate* (1) and *Owen's Estate* (2) go far to show that, strictly speaking, they had no *locus standi;* but having been noticed, and having appeared to answer charges made against them, we think it but just that they should have the costs of appearing by counsel before the Land Judge upon the motion of May 13; but we cannot give them the costs of the attendance of their witnesses. They have succeeded on this appeal, so far as to obtain a discharge of the Land Judge's order, and we give them the costs of the appeal. Their costs will be paid out of the estate next in priority after the petitioner's costs of the sale.

(1) 1 L. R. Ir. 242, 428; 4 App. Cas. 737. (2) [1897] 1 I. R. 186, 200.

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Walker, L.J. :—

Lord Justice Fitz Gibbon has dealt so exhaustively with the facts that I do not think it necessary to do more than state my opinion that the order of the learned Judge in this case was made without jurisdiction, and contrary to the policy which underlies and is expressed in the Land Act, 1903.

The great object of Part 1 of the Act is to facilitate the purchase by tenants of their holdings by the advance of public money, and also to facilitate the like purpose by means of the Land Commission buying in the first instance, and then re-selling to tenants, or redistributing, among tenants and persons described, the lands they buy with a view to the like purposes. The Land Commission are given power to acquire parcels of land for turbary and pasturage and other purposes mentioned in section 4, and they are given power to buy any untenanted land which they consider necessary for the purpose of facilitating the re-sale or redistribution of estates purchased. The Land Commission is defined to mean the three Estates Commissioners, and these Commissioners are invested and charged with the large powers and duties mentioned in Part 1 of the Act, including those I have stated.

The 6th section deals with the case where they buy direct from the owner, and invests them with large powers for the purpose of negotiating and regulating the price. But the same tribunal, the Estates Commissioners, may desire to buy for the same purposes lands for the sale of which a proceeding is pending in the Land Judge's Court, when an absolute order has been made. The Land Judge is carrying out the sale, his duty being to get the highest price he can obtain whether by public auction or private offer when competent parties interested approve; or where the 40th section applies with the condition of offers to the tenants. A new provision is introduced by sect. 7 in favour of the Estates Commissioners to enable them to intervene and offer to buy: "Where it appears to the Land Commission expedient to take steps with a view to the purchase . . . the following provisions shall have effect":—"The Land Judge may, at the request of the Land Commission, cause the Commission to be furnished with such particulars and documents as they may require respecting the estate."

The Estates Commissioners are the sole judges of the expe-

diency. That does not come within the purview of the Land Judge at all. He is the seller; they are the contemplated buyers. They are the sole judges as to whether public money should be advanced or not. The statute contemplates, as a part of the great public policy underlying the Act, the desirability of their making an offer for the purchase when they have pronounced on the expediency of it, and of being provided by the Land Judge who is selling with all the specified information within his control. I am of opinion it is mandatory on him to furnish it, or what he has. But I agree that the pending sale may have progressed to a point at which it would be unjust to the parties interested in the case of a solvent estate to arrest altogether its further progress, and render nugatory pending and almost perfected negotiations, and I think the obvious course to be then taken would be to inform the Estates Commissioners of the circumstances and explain the inutility of complying with the request in the interest of the owners and all concerned.

But here the Land Judge has negatived the request, and takes upon himself to decide, for reasons which he has stated in the report we have seen, which is not challenged as inaccurate in its main features, that the advance by the Estates Commissioners of public money for the purpose of re-selling to the tenants is not expedient in the interest of public justice. All I can say is that for purposes deemed wise and sufficient the Legislature has vested that jurisdiction in another independent tribunal in the same way that most other analogous jurisdictions have been centralized in the same tribunal. One can understand why that should be, but it is not necessary to seek a reason, as the Act is plain on that point.

I concur that the order of the Land Judge must be discharged.

HOLMES, L. J.:—

At the end of the argument on the hearing of this appeal, the Court had very imperfect information as to the sequence of events leading up to the order appealed from; but we have since had an opportunity of reading the documents referred to by Fitz Gibbon, L.J., who has been able by means of them to give a full, and I believe accurate, account of the facts material

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for our decision. It appears that previous to the letter of request from the Land Commission to the Land Judge, the trustees of Lord Ashtown had made a formal proposal for the purchase of the unsold portion of the Galway estate. This proposal had the sanction of Mr. Justice Barton, who, I presume, had control over the funds that were to supply portion of the purchase-money, and subsequently the petitioner in this matter was authorised by the Master of the Rolls to assent thereto.

Whilst these steps were proceeding, the letter of request was sent to the Land Judge's Court, but no action seems to have been taken thereon; and on the 2nd of March, the solicitor having carriage served notice on all the parties interested of an application to take the directions of the Land Judge in relation to the proposal to purchase. It is important at this point to understand the relative positions of the Land Commission on the one hand, and of the Land Judge on the other, to the purchase and sale of the property. By section 7 of the Irish Land Act, 1903, it is for the Land Commission to consider the expediency of taking steps with a view to the purchase of an estate for the sale of which an absolute order has been made under the Landed Estates Court (Ireland) Act, 1858. It is for that body to make all necessary inquiries, and to form a judgment as to whether an offer ought to be made, and if so, as to the amount of the offer. In performing this duty the Land Commission is given, subject to the provisions of the section, complete discretion; and as the purchase is to be made with public funds, it rests with the Commissioners to see that the money at their disposal is applied with prudence, and in furtherance of the purposes declared in Part I. of the Act of 1903. As I read the statute, the Land Judge is not concerned in the matters to which I have referred, and no jurisdiction connected therewith is given him. At the same time he has functions to discharge different in kind, but not less important. It is his business to see that the persons interested in the property are not prejudiced by the interference of the Land Commission. It has not been argued that the letter of request stays proceedings in the Land Court. Even in the most favourable circumstances there must be considerable delay before the Land Commission is in a position to become a

bidder; and in the meantime the chance of a speedy sale at a good price might disappear. Whether the Land Judge will give a reasonable time to the Land Commission to make an offer will depend upon the circumstances of the particular case. Sometimes it would be for the advantage of the owners of the property to give the Land Commission an opportunity to intervene. Sometimes an advantageous proposal from a private purchaser might be lost while waiting for such intervention. The Land Judge is the person to decide these questions, subject, no doubt, to an appeal to this Court, which, in a matter of purely judicial discretion, would be slow to interfere.

Having thus stated what I conceive to be the relative positions of the Land Commission and the Land Judge, I come to the hearing of the application of the 2nd of March. The property is unencumbered, and every person interested therein supported the acceptance of the Ashtown proposal, which was undoubtedly attractive. It is an old and valuable tradition of the Landed Estates Court that great weight is given to the views of those who are beneficially interested in the property; and, speaking for myself, I can find no reason for not considering favourably the advantageous offer of the trustees of Lord Ashtown. There were, however, two obstacles to its being accepted at once. In the first place, the proposal was based on the rental; and as some changes have taken place in the circumstances of the property since it was last offered for sale, it was necessary to have the rental then prepared, corrected, and brought down to date. In the second place, it was possible that the tenants were entitled to the right of pre-emption given by section 40 of the Land Law (Ireland) Act of 1896.

FitzGibbon, L.J., has read the rulings made on the hearing of the application of the 2nd March; and I infer therefrom that if and when these matters were settled, Mr. Justice Ross would be prepared to accept the Ashtown offer, and that in the meantime the final disposal of the application was postponed. I am of opinion that if the request of the Land Commission had then been brought to the notice of the Land Judge, he would have been at liberty to direct that further action thereon should also be postponed. Proceedings thereunder involve trouble and expense

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which ought to be avoided when it appears reasonably certain that they will lead to no result. But he was not asked to make such an order, and there was no reason for his doing so, inasmuch as the request was not referred to by anyone.

Down to the service of the notice of motion of the 13th May, the request seems to have been ignored; and the most curious circumstance in the case is that it was then brought before the Court, not by the Land Commission, nor by the tenants, but by the solicitor having carriage, who had already succeeded in removing any objection to the Ashtown proposal arising from the 40th section, and who, presumably, was taking steps to have the rental amended.

It is difficult, if not impossible, to ascertain from the documents why this application was made. It is, however, pretty clear that what was discussed on its hearing was whether tenants who were engaged in a boycott of the lands ought to be benefited by sect. 7 of the Act of 1903.

There is a reference to boycotting in an affidavit used on the motion of the 2nd March. This was not irrelevant, inasmuch as in considering an offer to purchase the existing circumstances of the property ought to be taken into account. But I think that this legitimate subject of enquiry developed into the abstract question of whether under any circumstances boycotting tenants ought to receive a benefit from sect. 7 of the Act of 1903. I am satisfied of this from the affidavits used and the oral evidence given on that occasion. This would have been a proper matter of consideration for the Land Commission, but, in my opinion, it was not within the jurisdiction of the Land Judge; and, therefore, I hold that the order appealed from cannot be sustained.

In setting aside the order, and making no rule on the motion, I wish it to be understood that the Land Judge is at liberty, now that the rental has been settled, to accept the Ashtown proposal, if it is not withdrawn. I go farther, and, speaking for myself, I say that, in the exercise of a sound judicial discretion, it ought to be accepted. It is to be regretted that the estate and the tenants have been put to trouble and expense in engaging in an inquiry which was both unnecessary and irrelevant; but the costs must fall on the estate, inasmuch as the solicitor having

carriage by serving the notice of the 13th May was the cause of this needless litigation.

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Solicitors for the appellants: *J. H. Walsh & Co.*
Solicitors having carriage: *E. & G. Stapleton.*
Solicitors for Lord Ashtown: *Richardson & Synnott.*

R. D. M.

PRESCOTT *v.* PRESCOTT.

M. R. 1905. Nov. 20.

(1905. No. 1000.)

Policy of insurance—Married Women's Property Act, 1882, *s.* 11—*Insurance in favour of husband.*

A wife effected a policy on her own life in favour of her husband, under the Married Women's Property Act, 1882, for £1000. By the terms of the policy the insurance company promised to pay £1000 to the husband, or his executors, administrators, or assigns, on the death of the wife. The husband paid the premiums on the policy, and predeceased the wife:—

Held, that the trust created by the policy and the Act in favour of the husband was not dependent on his surviving his wife, and that the policy belonged to his executors and not to his wife.

SUMMONS.

This was an application on behalf of the executors of William Prescott, deceased, to determine whether the beneficial interest in a policy of assurance on the life of Emily Jane Prescott for £1000, effected by her with the Standard Life Assurance Company under the Married Women's Property Act, 1882, s. 11, was vested in the executors of William Prescott, or in Emily Jane Prescott, his wife. The facts of the case are sufficiently stated in the headnote and in the judgment. The policy was effected on August 6, 1897, and William Prescott died on June 18, 1905 (1).

(1) A question was also raised by the summons—whether, in the event of the policy being vested in the wife, the executors had a lien for the premiums paid by the husband, but this question became immaterial.—[REP.]

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Alexander Henry, for the executors.

M'Gusty, for Mrs. Prescott:—

The mention of the executors and administrators of the husband in the policy does not make them *cestuis que trustent* under sect. 11 of the Act of 1882, which enables a trust to be created in favour of a husband, wife, or children only. The contract here was made by the Company with the wife, not with the husband; he would have been entitled to get the policy moneys if he had survived his wife; the intention was to make a provision for him, if he survived her, but not otherwise. There is no contract by the wife to keep up the policy. [He referred to *Re Adams's Policy Trusts* (1); *Cleaver* v. *Mutual Reserve Fund Life Association* (2).]

THE MASTER OF THE ROLLS:—

The life insured here is that of Emily Jane Prescott, the policy being in favour of William Prescott her husband. The sum assured is £1000 with participation in profits, and the annual premium £21 9*s.* 2*d.*

Mrs. Prescott is still living, and is the defendant in this summons. William Prescott is dead; and the question for decision is whether his representatives are entitled to the benefit of the policy for £1000, the amount for which Mrs. Prescott's life was insured. The policy is stated on its face to have been issued pursuant to the Married Women's Property Act, 1882; and the material portions of it are as follows:—"Life assured, Mrs. Emily Jane Smith or Prescott. Policy in favour of William Prescott. Proceeding on the declaration subscribed by William Prescott, dyer and cleaner, 1, Victoria-terrace, Clontarf, and Emily Jane Smith or Prescott, his wife, in connexion with this policy, which declaration is dated the 9th day of July, 1897, and is hereby declared to be the basis of this assurance, the Standard Life Assurance Company promises to pay to the said William Prescott, or his executors, administrators, or assigns, at the office of the said Company in Dublin, the sum of £1000 sterling, on the death of the said Emily Jane Smith or Prescott being certified and proved

(1) 23 Ch. D. 525. (2) [1892] 1 Q. B. 147.

to the satisfaction of the Directors of the Company." The premiums are stated to be payable by Mrs. Prescott, though there does not appear to be any binding obligation on her to that effect; and the contract is in form a contract with her. I think it is more than likely that it was really a contract made by her husband in her name. His personal representatives claim to be entitled to the benefit of the policy, by which the Company promised to pay to William Prescott, or his executors, administrators, and assigns £1000, and did not promise to pay anybody else. Mr. M'Gusty, who appeared for Mrs. Prescott, says that that is not so, as the executors of Prescott are not within the scope of section 11 of the Married Women's Property Act, 1882, and therefore not *cestuis que trustent* within that section. The words of the statute are as follows (I omit those that cannot apply here):—"A policy of assurance effected by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named,"—that is to say, the husband or children, or both, are the objects and *cestuis que trustent*—"and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured" (*i.e.* here of Emily Jane Prescott), "or be subject to her debts." Here the executors of William Prescott are named in the policy; perhaps, because of the notion which some untutored minds have that these words add something when dealing with chattels. They do nothing of the sort. An absolute declaration in favour of William Prescott simply is just the same as a declaration in favour of him, his executors, administrators, or assigns. The result of holding that the executors are not entitled would be that no one could deal with the policy during Mrs. Prescott's life by surrender or otherwise; that is, that it must go on, she, I suppose, paying the premiums, as there is no contract by her husband to pay them. The plain meaning of the policy is that the contract was for the benefit of William Prescott, and the addition of the words executors, administrators, or assigns, adds nothing and detracts nothing. This view is fortified by the judgment of Chitty, J., in *Re Adams's Policy Trusts* (1), where

(1) 23 Ch. D. 525.

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he says, at p. 527, speaking of a policy under section 10 of the Married Women's Property Act, 1882:—"It appears to me that the object of the policy and the Act taken together is to constitute a declaration of an executed trust, and that all the Court has to do is to express its view of the construction of the two instruments, taken together." That is to say, it takes effect on the making of the policy; it vests, not the money, but the interest in the policy at once. If the section had been intended to be confined to objects therein named provided they were alive when the policy moneys became payable, some words, such as "if surviving" or the like, would have been inserted, but they are not in it. Chitty, J., says it is an executed trust at once, and no one except the person named has an interest in it. Therefore, this policy belongs to William Prescott's estate, and not to Mrs. Prescott. The result is that the estate of William Prescott, which obtains the benefit of the insurance, takes it *cum onere*; and if the policy is kept alive, the premiums must in future be paid out of his assets. The costs of both parties will be payable out of the residuary estate of William Prescott, as it was a question properly arising in the administration of his estate.

Solicitors for the executors of William Prescott: *Dobbyn & M'Coy.*

Solicitor for Mrs. Prescott: *George Green.*

W. L.

RENEWABLE LEASEHOLD CONVERSION ACT; Ex parte SCOTT.

M. R.
1906.
Jan. 23, 30.

Lease for lives renewable for ever—Renewal fines—Conveyance of rent to grantee—Fines accruing due before and after date of conveyance—Lessor and lessee—Unity of title—Fee-farm grant—Renewable Leasehold Conversion Act—Practice—Petition.

A was absolutely entitled to the lessor's interest in premises held under lease for lives renewable for ever. Prior to 1870 until his death in 1889 he was also tenant for life of the lessee's interest in same premises. On his death the lessor's interest vested in B, and the lessee's interest vested in C. In 1898 B conveyed the rent reserved by the lease to D. The *cestuis que vie* all died between 1870 and 1874. C applied to D for a fee-farm grant:—

Held, that no fines which accrued due during the period that A was the owner of both the lessor's and the lessee's interest were now payable. That the fines which accrued due while B was entitled to the lessor's interest were payable to B, and the fines which accrued due since the date of the conveyance of 1898 were payable to D.

In all cases where a dispute has arisen as to the amount of renewal fines, or as to whom they are payable, or in what proportions, a petition under the Renewable Leasehold Conversion Act is the proper method of procedure.

PETITION, under the Renewable Leasehold Conversion Act, by James William Edmond Scott, a lunatic, who sued by Adam William Stafford Delmege and Frances Delmege, committee of the estate.

By lease, dated 23rd October, 1756, made between William Despard and Jane, his wife, of the one part, and Robert Palmer of the other part, certain lands of Shragh (and other denominations) containing 297 acres (Irish) were demised to Robert Palmer for three lives, therein named, with a covenant for perpetual renewal at the rent of £90 (late currency), equivalent to £83 1*s.* 6*d.* (present currency), and at a renewal fine of £22 10*s.* (late currency), equivalent to £20 15*s.* 4*d.* (present currency).

The last renewal of the lease was made by indenture of 28th October, 1801, between John Roe of the one part, and Robert Palmer of the other part; and the lives for which the lease was

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renewed were Robert Walsh, John Walsh, and John Dockrell, two of which lives dropped in 1870, and the last in 1874.

The petition stated that James William Edmond Scott, a person of unsound mind, was the owner of the lease within the meaning of the Renewable Leasehold Conversion Act, and that he was found to be of unsound mind, by inquisition, and was taken under the care of the Lord Chancellor in 1890; that two renewal fines became due and owing in 1870, and one renewal fine in 1874; that two septennial fines became due in 1878, also in 1886, and also in 1893, and also in 1903; that a septennial fine also fell due in 1874, and also in 1882, and also in 1897, and also in 1905, with interest at 5 per cent.

James William Butler Scott, father of James William Edmond Scott, the petitioner, was owner in fee of the lands of Shragh, and continued in such ownership until his death on 22nd April, 1889. Prior to 1870 he was also owner and in possession of the lessee's interest in the lands of Shragh and in receipt of the rent and profits thereof as tenant for life under his marriage settlement, by which the lessee's interest in the lands of Shragh was put in settlement, and under which the petitioner became, on the death of his father, entitled to the lessee's interest.

The lessor's interest in the lands of Shragh was, under the will of James William Butler Scott, vested on his death in his two daughters, Lady Elizabeth Glover and Mrs. Charlotte Sydserff, in equal shares, and they were appointed his sole residuary devisees and legatees, and also executrices of his will.

By deed, dated 21st September, 1898, and made between Lady Elizabeth Glover and Mrs. Charlotte Sydserff of the one part, and Robert Maxwell Marsh of the other part, the chief rent of £83 1*s.* 6*d.*, payable out of the lands of Shragh, was (*inter alia*) conveyed to Major Robert Maxwell Marsh, his heirs and assigns for ever, subject to certain specific charges. An application was made to him for a fee-farm grant of the premises comprised in the lease of 1756.

The 10th paragraph of the petition was as follows:—"The said Robert Maxwell Marsh has declined to execute the same (the fee-farm grant) until he receives payment of the entire of the said renewal fines and interest, although it would appear that the renewal fines and interest which fell due in the years 1870, 1874,

1878, 1882, and 1886, were properly payable to the representatives of the late James William Butler Scott (if payable at all), and the renewal fines and interest which fell due in the years 1890, 1893, and 1897, were properly payable to Lady Glover and Mrs. Sydserff in equal shares, leaving the renewal fines which fell due in January, 1903, and January, 1905, as the only renewal fines and interest payable to the said Robert Maxwell Marsh; and the said committee has accordingly been advised that they cannot safely pay to the said Robert Maxwell Marsh the entire of the said renewal fines and interest."

H. D. Conner, K.C., and *W. H. Boyd*, for the petitioner:—

The terms of the fee-farm grant have been agreed upon, and the only question in dispute is as to the renewal fines. Major Marsh, the respondent, refuses to execute the grant unless he is paid all fines which became due on the death of the *cestuis que vie* named in the last renewal of the lease of 1756, including the fines payable during the lifetime of James W. Butler Scott, the father of the petitioner, and also the fines accruing due between his death and the conveyance to Major Marsh in 1898. We admit he is entitled to all fines accrued due since 21st September, 1898. We also admit we are bound to pay all fines accruing due after the death of James William Butler Scott, and before 21st September, 1898; but we submit that the fines accruing due during the latter period are payable to Lady Glover and Mrs. Sydserff, the residuary legatees of the will of James William Butler Scott. Previous to his death James William Butler Scott was owner of both interests, and therefore no fines are now payable in respect of that period. Such fines become payable upon the death of a *cestui que vie*, and not at the time when a renewal is granted, and are on the same footing as rent, or interest, or charges, accruing due in like circumstances. It must, therefore, be assumed that all fines accrued due during such period have been satisfied, as the person to pay and the person to receive are one and the same: Lyne on Leases for Lives Renewable for Ever, pp. 209–211; *Freeman* v. *Boyle*, therein referred to; *Steele* v. *M'Call* (1); *De Vœux* v. *Mara* (2); *Donnelly* v. *Foss* (3).

(1) 7 Ir. Ch. R. 122. (2) 15 Ir. Ch. R. 16. (3) 7 L. R. Ir. 439.

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S. L. Brown, K.C., for Lady Elizabeth Glover and Mrs. Sydserff :—

So far as the fines which accrued due during the time when James William Butler Scott was alive, and was owner of the reversion, and also the owner of the interest of the lessee, we must admit we cannot sustain any claim. But we are entitled to all fines which accrued due from the date of the death of James William Butler Scott until the 21st of September, 1898, when the reversion was conveyed to Major Marsh : Furlong's Landlord and Tenant, p. 283; *Freeman* v. *Boyle* (1); *De Vœux* v. *Mara* (2); *Donnelly* v. *Foss* (3).

Ronan, K.C., and *Brunskill*, for Major Marsh:—

This is a petition under section 22 of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), and no dispute such as is mentioned in that section has arisen between the parties so as to justify the petitioners in applying to the Court by petition.

[The Master of the Rolls: How did the matter come before the Court in *Donnelly* v. *Foss* (3) ?]

That was an action, and the report shows that the decision was given on a motion for judgment.

The question as to whether a purchaser of a lessor's interest is only entitled to fines payable on a renewal which accrued due after the date of his purchase, and whether all fines that accrued prior to the purchase belong to the vendor, is not concluded by the decision of the Master of the Rolls in *De Vœux* v. *Mara* (2). In *In re Tibeaudo's Estate* (4), which, although reported in the 14th volume of the Irish Chancery Reports, was actually decided after *De Vœux* v. *Mara* (2), Judge Hargreave gave a contrary opinion to that expressed by the Master of the Rolls. The cases between tenants for life and remaindermen, which are relied on by the other side, do not apply to this case, which is one between vendor and purchaser.

The conveyance of the lessor's interest conveyed all the estate of the vendors in the reversion to Major Marsh, and there

(1) 2 Ridg. P. C. at p. 83.
(2) 15 Ir. Ch. R. 16.
(3) 7 L. R. Ir. 439.
(4) 14 Ir. Ch. R. 322.

is no such conveyance in the case of a tenant for life and remainderman. The lessee of a lease renewable for ever who comes into a Court of equity for a renewal or a fee-farm grant applies to be relieved against a forfeiture of his estate to his then landlord, who in this case is Major Marsh. Equity will give him relief against the forfeiture on reasonable terms, such as giving compensation to his landlord for failure to renew at the proper time. Such compensation should be made to him, who alone can grant the new lease or fee-farm grant, and who would be the person to profit by the forfeiture of the lease. A similar case to the present is mentioned in the note on page 212 of Lyne on Leases for Lives, and the opinion there expressed supports our contention.

Jan. 30.

THE MASTER OF THE ROLLS (after stating the facts as above set out) continued :—

The question therefore arises, first, as to fines which fell due during the time the petitioner's father, James William Butler Scott, was tenant for life of the lessee's interest as well as owner of the lessor's interest. That question was given up at the Bar by counsel for the residuary legatees of Mr. Scott's will. Mr. Scott was in possession of the lands, and the fines which became due at that time would, if paid, have been paid to himself. His was the hand to pay and the hand to receive, and it would be idle to rip up that matter now.

The next question is one as to which there was at one time a difference of professional opinion, namely, as to the renewal fines which became due to the grantor of a fee-farm grant. Major Marsh became the purchaser of the rent in September, 1898, and he claims the renewal fines since that date, and also the renewal fines which accrued due during the time when those who made the conveyance to him were entitled. The question therefore is simply whether the renewal fines which accrued due to the vendors of the reversion before the date of the deed of 1898 belong to the vendors or passed by grant to the purchaser. Of course, if the deed of conveyance, by general or particular words, dealt with renewal fines so as in any way to pass them directly, there would be no question. It, however, arises here in naked form, because the conveyance of 1898, under which Major Marsh took, purports only to be a

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conveyance of the rent, without even mentioning arrears; and it is difficult to see how the deed could thus pass the renewal fines.

However, the matter is not free from authority, for the question has been considered in a number of cases, and at one time there was a conflict of opinion as to whether, in cases like the present, the renewal fines belonged to the person who is called on to execute the fee-farm grant, or were divisible having regard to the title of the predecessors of the grantor.

Mr. Lyne's book on Leases for Lives Renewable for Ever has been cited in numbers of cases. He took extraordinary care to ascertain reported and unreported cases, and has sometimes even considered and dealt with the opinions of counsel. He states thus (p. 209):—"Where the party has died who would have received the renewal fines, had they been tendered at the times they became payable, it was for a long time a question, whether the representatives of such person were entitled to the fines which fell due in his lifetime, or whether they should go to the person who actually executed the renewal. It is now considered as settled that the representatives of the deceased party are entitled. It was contended by some that the fine was not *due* until the renewal was executed, for that the new grant was the cause of the fine; that where a forfeiture had accrued by neglect to pay the fine within the time limited by the covenant, the payment of the fines was the price of the waiver of that forfeiture by the person who was entitled to take advantage of it, and should be made to him who alone could grant the new lease. On the other hand it was said, that the grant of the renewal was a condition subsequent to the payment of the fine, and that relief was decreed on the principle of Courts of Equity, that a thing covenanted to be done should be looked on as done; and, therefore, the fine should be considered as due to the person in whose lifetime it became payable; and that it was on that principle the Court was in the habit of decreeing interest to be paid by the lessee from that time, for that interest can only be due for the detention of a debt." Then he cites the opinion of a number of counsel, the last of whom "were of opinion that the representatives of the person in possession when the fine became payable were entitled." He says:—

This last seems to have been the doctrine of the Courts in Ireland, and to have been acted on *sub silentio* in the case of *Freeman* v. *Boyle* (1), in 1788, where the decree of the House of Lords directed such fines as became payable to the respondent's father in his lifetime, with interest for the same, to be paid to his personal representative. Lord Redesdale, too, considered each fine as a 'fruit fallen' when it became payable; and on that ground held that the personal representative of a deceased tenant for life, in whose lifetime fines had accrued, ought to be a party to a bill for a renewal filed against the remainderman," And he adds:—"Where the landlord has made a lease of the reversion, subject to a lease for lives renewable for ever, the lessee of the reversion is entitled to the renewal fines payable in respect of the other lease."

That case of *Freeman* v. *Boyle* (1) and the case before Lord Redesdale were for a long time considered conclusive on the question; and the passage I have quoted from Mr. Lyne's book was quoted twice with approval by the Master of the Rolls (Mr. Cusack Smith) in *Steele* v. *M'Call* (2) and in *De Vœux* v. *Mara* (3), and must be taken to be the opinion of that very learned Judge in the matter. In Mr. Furlong's book on the Law of Landlord and Tenant, the matter is treated in the same way. He says (page 285):—"Where the estate of a landlord which is subject to a lease for lives perpetually renewable, had been limited to successive tenants for life, with remainders over, it has often been discussed whether the personal representatives of a deceased tenant for life are entitled to the renewal fines which fell due in his lifetime, or whether such fines become the property of the remainderman, or other persons by whom the renewal is actually granted." He refers to the case mentioned in Mr. Lyne's book, and says:—"The House of Lords decided that such of the renewal fines as became payable to the respondent's father in his lifetime, should be paid with interest for the same to his personal representatives, and that the remaining fines with interest should be paid to the respondent"; and he cites other cases on the same subject.

(1) 2 Ridg. P. C. 69, at p. 83. (2) 7 Ir. Ch. R. 122. (3) 15 Ir. Ch. R. 16.

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Such was the state of the law up to the decision of *De Vœux* v. *Mara* (1), where the facts were different from the present case, but the principle is the same; and the only thing that throws doubt on the question is *In re Tibeaudo's Estate* (2), which was decided by another very learned Judge. It was not a decision on the exact point, for, though Hargreave, J., expresses a strong opinion on it, he prefaces his observations by saying that the question did not and could not arise in the case before him. Still he went on to give his opinion, founded exclusively on the words of the statute 1 Wm. 4 c. 65, re-enacted in Ireland by the 5 & 6 Wm. 4, c. 17, which provides that where a renewal is made for a lunatic grantor, in pursuance of the Act, renewal fines which have accrued due are, after his death, to pass as real estate to his heir, and not to his personal representative. With all respect to the learned Judge, it does not appear to me that the words of the statute are really conclusive on the present question. The argument is that if a renewal fine was not something that would attach to the inheritance and had accrued due at the time of the death, it ought to go to the personal representative, whereas the statute says it shall go to the heir. But it is the statute which provides what is to become of the property of a lunatic after his death, and it undoubtedly made the renewal fines go to the heir; but that statute is in no way declaratory of the rights of parties not lunatics; for the mode of succession is equally applicable to rent and renewal fines which have accrued due. It has been put that the whole doctrine of renewal fines is simply the doctrine of accrued rent, and the analogy is somewhat loosely recognized in *Donnelly* v. *Foss* (3), where Sir Edward Sullivan held that there was a similarity for some purposes between the case of rent and renewal fines. In that case, however, in accordance with *De Vœux* v. *Mara* (1), and *Steele* v. *M'Call* (4), and *Freeman* v. *Boyle* (5), the Master of the Rolls held that renewal fines followed the devolutions of the title. The facts were these: The reversion of a lease renewable for ever belonging to a married woman was settled on the husband for life, subject to an annuity to the wife. The

(1) 15 Ir. Ch. R. 16.
(2) 14 Ir. Ch. R. 322.
(3) 7 L. R. Ir. 439.
(4) 7 Ir. Ch. R. 122.
(5) 2 Ridg. P. C. 69.

husband became bankrupt, and the question was as to the right of the assignees to renewal fines, and it was decided that they were entitled to the arrears of fines which accrued due after the marriage, but that the fines which accrued due before the marriage were a *chose in action* of the wife, subject to the right of the husband to reduce them into possession; and the question was whether or not the fines had actually been reduced into possession; and it was held that they had not. Therefore, the case is the same as if there had been no married woman in the case at all, but the lady was entitled to an estate for life, prior to the husband's life estate, and the decision follows directly in line with all the other authorities on the subject except *Tibeaudo's Case* (1). *Tibeaudo's Case* (1) was decided in November, 1863, after the decision of *De Vœux* v. *Mara* (2), which, although reported in the subsequent volume, was actually decided in April of the same year; but it was not cited in *Tibeaudo's Case* (1) to Hargreave, J., not being reported at the time; and I have no doubt that if the decision had been cited, the learned Judge would at least have abstained from expressing an opinion which was unnecessary for the decision of the case before him, and which is contrary to all the decided cases.

I think, therefore, as regards these renewal fines which accrued due prior to the sale to Marsh, and during the time his grantors were owners, that they belong to them, and not to him. That does not, of course, affect the question which has arisen in some cases that the actual owner of the reversion, if called on to execute a fee-farm grant, can give to the grantee a valid discharge for the whole of the renewal fines that have accrued due.

Mr. Ronan argued that this was not a proper case to be decided on summary petition. I own I was surprised when this point was made. It depends on the 22nd section of the Renewable Leasehold Conversion Act. It was stated in the petition, and has not been contradicted, and I must take it as admitted, that Marsh has declined to execute the fee-farm grant until he receives the renewal fines which are now payable and all those that accrued due prior to the deed of 1898. At any rate, there is a dispute

(1) 14 Ir. Ch. R. 322. (2) 15 Ir. Ch. R. 16.

M. R. 1906. *Ex parte* Scott.

about the fines, and I think it clear that every case of the kind comes within the words of the section. Those words are—"And be it enacted that, where the owner of any lease or underlease in perpetuity, of any degree of tenure of lands in Ireland, has required a grant under this Act, and the owner of the reversion, lease, or superior underlease, or estate, from whom such grant has been required, disputes the right to such grant, . . . or where the owner who might be required to execute a grant under this Act is not known, or there is or are any arrear of rent, fine or fines, or fees, which, under this Act, might be required to be paid before the execution of a grant under this Act, and the owner required to execute such grant has refused to accept payment thereof, or there is no person to whom the same can properly be paid, or it is not known to whom the same ought to be paid, it shall be lawful for the owner of the lease, or underlease in perpetuity who has required such grant or would be entitled to require the same, as the case may be, to apply to the Court of Chancery in Ireland, or Court of Exchequer in Ireland, on the equity side thereof, in a summary way by petition praying that a grant may be executed to him under this Act."

Solicitors for the petitioner: *Fry & Son.*
Solicitor for Lady Glover and Mrs. Sydserff: *R. D. Vaughan.*
Solicitors for Major Marsh: *Carruthers & Gamble.*

R. W. L.

IN THE MATTER OF THE ESTATE OF THE RIGHT HON. THE EARL OF RANFURLY.

Meredith, J.
1905.
Oct. 9.
Nov. 30.

Land Purchase Acts—Lands held under fee-farm grant—Covenant reserving benefit to grantor in event of mines being worked—Agreement for sale—Interest in covenant.

A grantee under a fee-farm grant entered into an agreement to purchase the lands therein comprised under the Land Purchase Acts. The mineral rights were vested in the grantee by virtue of the grant. The said lands lay amongst other lands comprised in the estate, held under ordinary judicial and other tenancies. There were underlying the estate valuable minerals, which had from time to time been, and were at the time of sale being, worked by the vendor. The fee-farm grant contained a covenant by the grantee that if at any time thereafter the mines or quarries underlying the lands therein comprised should be worked, or any profit derived therefrom, he would pay a royalty-rent to the vendor. On a question arising as to whether, under the agreement for sale, the vendor was entitled to retain his interest in the said covenant:—

Held, that, by excluding from the sale the mines and quarries and the covenant in relation thereto, he was so entitled.

The following clause in the agreement for sale, reserving to the vendor his interest in the said covenant, was approved and adopted:—"The exclusive right of mining and taking minerals within the meaning of the said Act, and of digging and searching for the same, having been vested in the tenant by the said fee-farm grant, the same, together with the right of the vendor under the covenant by the grantee in the said fee-farm grant contained, in the event of the mines or quarries being leased or worked by the grantee, to receive a rent equal to one moiety of any royalty or other rent that may be derived by the grantee, is excluded from the sale."

QUESTIONS submitted to the Judicial Commissioner for his decision under the provisions of sect. 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—The vendor was selling to his tenants direct. The lands for sale were situated in the county of Tyrone. They had, for convenience, been divided into several divisions.

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In re RANFURLY'S ESTATE.

Each of these divisions the Estates Commissioners had agreed to deal with as a separate estate. It had been proved to the satisfaction of the Estates Commissioners that there were valuable minerals underlying two of the estates, situated in and about the town of Dungannon, and that these mineral rights had, from time to time been, and were at the present time being, worked and developed by the vendor, who was tenant for life of the said two estates. Under these circumstances the Estates Commissioners had, save as to the lands comprised in certain fee-farm grants, agreed that the vendor should be at liberty to reserve the mineral rights, within the meaning of the Act, underlying the said two estates. Portion of the lands on one of these estates had been let in fee-farm by the vendor or his predecessor in title to the present occupying tenant. These lands lay amongst other lands comprised in the said two estates, which were held under ordinary judicial and other tenancies.

By one of these fee-farm grants, dated January 20, 1872, and made between the Right Hon. Thomas Granville Henry Stuart, Earl of Ranfurly, predecessor in title of the vendor, of the first part, James Mitchell and others of the second part, and Alexander M'Lean of the third part, the lands therein described were granted to the said Alexander M'Lean, subject to the yearly rent of £15 12*s.*; and the said Alexander M'Lean thereby covenanted for himself, his heirs, executors, administrators, and assigns, that if at any time thereafter any mines or quarries of marble or slate lying in or under the said lands should be opened and worked, or any profit or produce derived therefrom, then and in that case the said Alexander M'Lean, his heirs and assigns, should and would, over and above the said annual rent thereby reserved, yield and pay unto the said Earl of Ranfurly, his heirs and assigns, a further additional rent equal in amount to one moiety of any royalty or other rent which should be reserved out of such mines or quarries under any lease, or contract for a lease, which the said Alexander M'Lean, his heirs and assigns, should, at any time or from time to time, thereafter make or execute to any person or persons body public or corporate, or joint stock company, who should undertake the opening and working of such mines or quarries, and that, in case the said Alexander M'Lean, his heirs and assigns, should not

make or execute any such lease or contract as aforesaid, but should by himself or themselves, or his or their agents or workmen, open or work any mine or mines, or any quarry or quarries of marble or slate, in or under the said lands and premises, then and in such case, he, the said Alexander M'Lean, his heirs and assigns, should and would, over and above the said yearly rent, yield and pay to the said Earl of Ranfurly, his heirs and assigns, an additional annual rent equal in amount to one moiety of the said royalty-rent as had been heretofore usually reserved by the Ecclesiastical Commissioners of Ireland under leases of mines or quarries of a similar nature, and under like circumstances to or with those which should be so opened and worked by the said Alexander M'Lean, his heirs and assigns, as aforesaid.

The interest of the said Alexander M'Lean had now become vested in George Little. The said George Little had agreed to purchase the lands, so held by him under the said fee-farm grant, from the vendor under the Land Purchase Acts, for the sum of £408. By the said agreement it was proposed that the fee-simple of the said lands, without any reservation as to mines and minerals, should be vested in the tenant; but the said agreement contained the following clause :—"The exclusive right of mining and taking minerals within the meaning of the said Act, and of digging and searching for the same, having been vested in the tenant by the said fee-farm grant, the same, together with the right of the vendor under the covenant by the grantee in the said fee-farm grant contained, in the event of the mines or quarries being leased or worked by the grantee, to receive a rent equal to one moiety of any royalty or other rent that may be derived by the grantee, is excluded from the sale." It appeared that the purchase-money of £408 had been arrived at on the basis that the vendor was to remain entitled to the benefit of the said covenant.

From the affidavit of George Little it appeared that he had purchased the said holding in the year 1901, and that on the occasion of such purchase he had paid an enhanced price for the same owing to the fact that the royalties were the property of the grantee. The vendor in his affidavit stated that his interest under the said covenant might, in the near future, become very valuable,

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but that, at the present time, it would be quite impossible to estimate the value thereof in money.

In re Ranfurly's Estate.

The Estates Commissioners were willing to allow the vendor to retain his interest under the said covenant, provided the Judicial Commissioner was of opinion that this could be done.

The following questions were submitted:—

1. Can the vendor retain his interest in the said covenant if the sale was carried out under the provisions of the Land Purchase Acts?

2. If not, in whom should the mineral rights mentioned in the said fee-farm grant be vested?

G. N. Oulton, K.C., for the vendor.

Cur. adv. vult.

Nov. 30.

Meredith, J.:—

I hold that the vendor can retain his interest in the covenant in question by excluding from the sale the mines and quarries, and the covenant in relation thereto; and I approve of the form of the clause proposed for the purpose of the order which I am now making in the case of George Little. I am prepared to approve of a like clause in the case of any other sales on the estates of the vendor of holdings similarly held under grants reserving royalty-rents.

Solicitors for the vendor: *Longfield, Kelly, & Armstrong.*

J. E. W.

GOGARTY *v.* HOSKINS.

(1905. No. 74.)

Barton, J.
1905.
Dec. 15, 17, 20.

Landlord and tenant—Lease—Building plots—Plots to be intersected by "intended road"—Words of abuttal amounting to implied grant of easement.

A lessor demised to a lessee two plots of ground, A and B, "with the rights, members, and appurtenances thereunto belonging, or in any wise appertaining," for ever, subject to a rent. Plot A was described *inter alia* as being bounded on the east by "an intended road, to be 38 feet wide, intersecting said lot from lot B," and lot B was *inter alia* described as being bounded on the west "by said intended road, 38 feet wide, intersecting said lot from lot A." Upon the map annexed to the lease the aforesaid intersecting passage was delineated as being 38 feet wide, and was described as "a proposed new road reserved by Dr. T." (the lessor).

The lease, which contained a covenant by the lessee to keep all buildings to be thereafter erected strictly as private dwellinghouses, was made in pursuance of a previous agreement in writing, "to take a lease of the plots marked A and B on the map annexed hereto." The map was an estate map of the lessor's estate laid out in building plots, and showed these plots, A and B, marked in red, covered by terraces of houses, with a lane behind. The two plots A and B were shown, with the intersecting road, 38 feet wide, including two footpaths, 5 feet wide each. Written on the map were the measurements of the two lots, and the words—"The lots to be as is marked on map," with the signatures of the parties.

The lessee erected a terrace of houses on each plot with a lane at the rear, into which the back doors of the houses opened. The lane communicated with the intersecting space, which, in its turn, led to a public road. The corner house of one of the lots had a side gate, giving access to the intersecting space. The intersecting space remained for thirty years dividing the two terraces, and affording access to and from them, and to and from the lane at the rear. The lessor, having abandoned the rest of his building scheme, and having no further use, in connexion therewith, for this intersecting road, advertised it for sale for building purposes, subject to an obligation by the purchaser to leave a passage 10 feet wide, connecting plaintiff's back lane with the public road. The plaintiff brought the action to restrain him from so doing:—

Held, that from the words of the lease, describing with such particularity the abuttal of the two plots upon an intended intersecting road "to be" 38 feet wide, there was to be implied a grant of an easement of way to and from and

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GOGARTY v. HOSKINS.

across an intersecting space of that width, which imposed upon the lessor a binding obligation not to use the intersecting space for any purpose inconsistent with such grant; and that, consequently, plaintiff was entitled to an injunction.

TRIAL OF ACTION.

By an indenture, dated the 6th December, 1876, and made between Alexander Taylor of the first part, Mary Jane Waddell of the second part, and Henry J. K. Gogarty of the third part, Alexander Taylor and Mary Jane Waddell demised to Henry J. K. Gogarty, his heirs and assigns, certain lands and premises therein described as "All that and those the two pieces or plots of lands, portion of the Prospect estate, Glasnevin, one lot marked A on the map hereon traced, containing in front to the road leading from Dublin to Glasnevin, 282 feet or thereabouts, and in the rere the like number of feet, from front to rere 135 feet or thereabouts, bounded on the north-west by an intended lane, on the south by the said road to Glasnevin, on the east by an intended road to be 38 feet wide, intersecting said lot from lot B, thereinafter demised, and on the west, by a pass from the said Glasnevin-road to Glasnevin cemetery, and also the lot marked B on said map, containing in front to the said road, in a line in continuation of the southern boundary of lot A, 300 feet or thereabouts, and in the rere the like number of feet, and from front to rere on the east side 157 feet or thereabouts, and on the west side 135 feet or thereabouts, bounded on the north-west by an intended lane, on the south by the said road to Glasnevin, and on the east by other part of the said estate belonging to the lessor, and on the west by said intended road, 38 feet wide, intersecting said lot from lot A, all which said premises are more particularly delineated on the map hereon traced, and are situate in the barony of Coolock and county of Dublin." The premises were demised with the rights, members, and appurtenances thereunto belonging, or in any wise appertaining to the use of Henry J. K. Gogarty, his heirs and assigns, for ever, subject to the yearly rent of £65. The indenture also contained a covenant on the part of Henry J. K. Gogarty, his heirs and assigns, not to permit the erection of any steam or other machinery or shops, and to keep

all buildings to be thereafter erected on the said premises as private dwelling-houses or offices.

The road referred to in the indenture, and therein described as the eastern boundary of lot A and western boundary of lot B, and as an intended road intersecting lot A from lot B, was delineated on the map endorsed thereon as being of the width of 38 feet, and was described as, and called on the map, "a proposed new road reserved by Dr. Taylor."

The plaintiff averred that the premises which, with the lands and premises adjacent thereto, were, at the time of the execution of the said indenture, the property of Alexander Taylor, were demised to Henry J. K. Gogarty for the purpose of building terraces of residential houses thereon, in furtherance of a building scheme, which said Alexander Taylor had formulated for the development of the property, and that, prior to the execution of the lease, Alexander Taylor and Henry J. K. Gogarty had endorsed their names upon a map or plan of the scheme of said Alexander Taylor for the building on and laying out of his said property, and that the said Henry J. K. Gogarty accepted the said lease, on the representations of the said Alexander Taylor, that the property was to be laid out with roads and lanes, as delineated on the said map or plan, on which was shown, between the lots marked A and B, a space marked 38 feet in width, and thereon described as "a proposed new road."

The map referred to was an estate map of the lessor's estate, and was annexed to a letter, dated September 19, 1876, from Henry J. K. Gogarty to Alexander Taylor, in which Henry J. K. Gogarty proposed to take a lease of the plots marked A and B upon the said map.

The said Henry J. K. Gogarty erected on plot B in his lifetime a terrace of fifteen houses, formerly known as Nos. 1 to 15 St. Joseph's Crescent, and now known as Nos. 124 to 152 Botanic-road, and on plot A a terrace of six houses, formerly known as Nos. 9 to 14 Kincora-terrace, but now known as Nos. 110 to 120 Botanic-road.

Henry J. K. Gogarty died on the 7th March, 1891, intestate. All his estate and interest in the premises became vested in the plaintiff, Margaret M. Gogarty. Since the death of Henry J. K.

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Gogarty the plaintiff had erected upon plot A the houses now known as Nos. 102 to 108 Botanic-road.

The plaintiff also averred that along the entire of the rear or northern boundary of the houses built upon the said demised premises there was a passage or laneway upon which backdoors or entrances of these houses opened, and that these backdoors were used by the plaintiff's tenants of the houses for the purpose of getting in coals, removing ashpit refuse, and other matters; that the only way by which horses or carts could reach this laneway or passage from the public road was over the space or passage between the plots A and B; and that there was a garden door opening from the side wall of the house now known as No. 120 Botanic-road into this intersecting passage. The defendant, in whom was vested all the estate and interest in the premises of Alexander Taylor, had, some short time before action brought, advertised the entire of the space or passage between lots A and B, 38 feet in width, for sale as building ground, with an obligation upon the purchaser to leave open and unbuilt on a passage, at the rear of the house to be built on said plot, of the same width as the existing passage at rear of the premises No. 120 Botanic-road, and the premises No. 124 Botanic-road, and a passage 10 feet wide connecting said rear passage with Botanic-road, to be used for all purposes for which a right of way was exercised over the lands comprised in the lot containing said passage.

The plaintiff's case was that a space of only 10 feet in width connecting the passage at the rear of her houses with the public road would not enable carts therefrom to turn into or reach this lane or passage, and that having regard to the provisions of the lease and the building scheme, on the faith of which that letting was made, she and her tenants were entitled to have a space of 38 feet in width left unbuilt upon between the plots marked A and B, and to have a right over same at all times and for all purposes connected with her houses, and that the erection of a building on the aforesaid space would be a serious injury to her.

It was proved at the trial that the building scheme as delineated on the map attached to the letter of September 19, 1876, was afterwards abandoned by the lessor.

The evidence upon this and other matters is referred to in the judgment of Barton, J.

The plaintiff claimed a declaration that she was entitled to a right of way for herself, her lessees, and the tenants of the houses built upon the premises demised by the indenture of 6th December, 1876, over the above-mentioned passage or roadway intersecting the building lots thereby demised, and an injunction restraining the defendant from obstructing this passage or roadway, or any part of it, by building upon it or otherwise.

Ronan, K.C., and *Garrett Walker* (with them *Henry Gogarty*), for the plaintiff:—

The plaintiff's predecessor in title accepted the lease on the representation of the lessor that the property was to be laid out in roads and lanes as delineated upon the map annexed to the lease, and upon the map annexed to the letter of 19th September, 1876. The maps show that there was to be a right of abuttal on this proposed road, and there is no case where there is a right of abuttal on an intended new road where there was not held to be a right to some road. Here there is a right of abuttal in respect of both plots on either side of an accurately defined intersecting space, described as an intended new road, and the lessor is estopped from denying the right of abuttal, though possibly the plaintiff's right is founded on an implied covenant rather than on estoppel. The fact that land is described as bounded by or abutting on a roadway estops the vendor from denying that there is in fact a road there: *Roberts* v. *Karr* (1). Even where the roadways or streets do not in fact exist at the date of the conveyance, the principle is the same: *Espley* v. *Wilkes* (2). The principle laid down in *Roberts* v. *Karr* (1) was followed by Farwell, J., in *International Tea Stores Company* v. *Hobbs* (3). See the last paragraph of the judgment at page 173 of the report. *Harding* v. *Wilson* (4) seems to be somewhat conflicting. There the words were an "intended way," and the lessee was held at all events to be entitled to a convenient way; while the case resolved itself into a question of damages. But

(1) 1 Taunt. 495.
(2) L. R. 7 Ex. 298.
(3) [1903] 2 Ch. 165.
(4) 2 B. & C. 96.

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there was no map in that case, and its authority seems to be doubted by Lord Selborne in *Furness Railway Company* v. *Cumberland Co-operative Building Society* (1), though he distinguishes it from *Roberts* v. *Karr* (2) and *Espley* v. *Wilkes* (3), authorities which are approved of and followed in that case. It should be noted that in the *Furness Railway Company* v. *Cumberland Co-operative Building Society* (1) the streets, with which the land conveyed was delineated as communicating on the map or plan, were not in existence at the date of the conveyance, the land being waste building land at the outskirts of a town. Where roads and ways corresponding with those shown on the plan are mentioned in the deed of conveyance, though there may be no grant of them in terms, the deed and plan together operate as a grant of a right of way, even though there are no roads made in the places shown in the plans: see Goddard on Easements, 6th ed., page 359; *Roe* v. *Siddons* (4). In the present case the lots were to be respectively bounded by this proposed road intersecting one lot from the other, with nothing else between them except this road 38 feet wide, and the premises were demised with "the right, members, and appurtenances thereunto belonging or in anywise appertaining." These rights, &c., are clearly marked and defined upon the map. Therefore, upon the ground of estoppel, and upon the terms of the contract itself, the defendant is precluded from interfering in any way with this clearly-marked and defined intersecting space. [They also referred to *Donnelly* v. *Adams* (5).]

O'Connor, K.C., *Redmond Barry, K.C.*, and *Hugh Kennedy*, for the defendants:—

No contract can be implied from the map. The road was only intended for the benefit of the lessor, and was expressly reserved to him. The lease contains no covenant on the part of the lessee to build. The lessee got the ground untrammelled by any such covenant. There is no representation either in the lease itself or in the map that any road existed in fact. In

(1) 52 L. T. R. 144.
(2) 1 Taunt. 495.
(3) L. R. 7 Ex. 298.
(4) 22 Q. B. D. 224.
(5) [1905] 1 I. R. 154.

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Roberts v. *Karr* (1) the premises were described as abutting on a road, which was in actual existence at the time of the conveyance, and the decision was based on estoppel. In *Espley* v. *Wilkes* (2) the roads were not in fact in existence at the date of the conveyance, but they were described in the lease as actually existing, and the way claimed was claimed as a way of necessity. This case was also decided on the ground of estoppel. In *Furness Railway Company* v. *Cumberland Co-operative Building Society* (3) a right of way was given by the deed itself; while in *International Tea Stores Company* v. *Hobbs* (4) the question was in reference to a right of way actually enjoyed at the date of the sale of the premises. Here there is only an intention or proposal to make a road, which does not amount to a completed contract. To constitute an estoppel there must be a representation of an existing fact; a mere expression of intention is not sufficient: *Jorden* v. *Money* (5); see also Smith's Leading Cases, vol. ii., p. 854. In the present case a right of way did not pass as appurtenant to the premises, nor as a way of necessity, as the plots adjoined the public road, nor by express grant. There was no obligation on the lessee to build according to any fixed scheme, or in fact to build at all. It was quite open to the lessee to use the land for agricultural purposes, if he so chose; and it was also quite open to him when he did build to have built in such a way as to have provided an outlet for the lane through either plot.

BARTON, J.:—

Dec. 20.

The plaintiff and defendant represent respectively the lessee's and lessor's interests under a lease of December 6th, 1876, of two plots of land fronting Glasnevin-road which were demised for ever subject to a rent "with the rights, members, and appurtenances thereunto belonging, or in any way appertaining," under the following description:—"All that and those, the two pieces or plots of land, portion of the Prospect estate, Glasnevin, one lot marked A on the map hereon traced containing, &c., . . . bounded

(1) 1 Taunt. 495.
(2) L. R. 7 Ex. 298.
(3) 52 L. T. R. 144.
(4) [1903] 2 Ch. 165.
(5) 5 H. L. Cas. 185.

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on the north-west by an intended lane, ... on the east by an intended road, to be 38 feet wide, intersecting said lot from lot B, hereinafter demised, . . . and also the lot marked B in said map, containing, &c., . . . bounded on the north-west by an intended lane, . . . and on the west by said intended road, 38 feet wide, intersecting said lot from lot A, all which said premises are more particularly delineated on the map hereon traced." The map in the lease showed two plots A and B facing Glasnevin-road with "intended lane" at back, and intersected by a space marked "proposed new road reserved by Dr. Taylor, 38 feet in width." As regards the expression "proposed road" on the map, I do not think that it can weaken or modify whatever effect should be given to the words "intended road" in the lease.

The lease, which contained a covenant by the lessee to keep all buildings to be thereafter erected strictly as private dwelling-houses, was made in pursuance of a previous agreement contained in a letter dated September 19th, 1876, which was accompanied by an annexed map. The letter embodied an accepted proposal "to take a lease of the plots marked A and B on the map annexed hereto." The map was an estate map of the lessor's estate, called the Prospect estate, laid out in building plots, and showed these plots A and B marked in red, covered by terraces of houses, with a lane behind. The two plots A and B were shown with the intersecting road, 38 feet wide, including two footpaths 5 feet wide each. Written on the map were the measurements of the two lots, and the words, "The lots to be as is marked on map," with the signatures of the parties. Plaintiff's counsel relied upon this previous agreement and map as a representation on the faith of which the lease was taken; also as evidencing the purpose and subject-matter of the letting, and showing that the two plots were part of a building estate which, in the contemplation of the parties, were to be occupied by terraces divided by, and having access to, this intersecting road. The question must, however, come back to the construction of the language of the lease itself. The language of the lease about this intersecting road is very definite and circumstantial, and seems to me to admit of only one fair and honest construction.

The facts which have led up to these proceedings may be

very briefly stated. After the execution of the lease the lessee proceeded to build two terraces upon the two plots respectively, and both lots are now covered with houses which front Glasnevin-road, and communicate with a back lane behind. The intersecting space of 38 feet has for thirty years—*i.e.* ever since 1876—remained available for access from the back lanes of the two terraces to the public road. It has also remained available for access from the two corner houses which abut upon it; and one of these houses has a side door or gate communicating into this intersecting space. The lessor abandoned the remainder of his original building scheme, with the result that this intersecting road no longer serves any useful purpose to defendant as part of his original scheme of further estate development. Accordingly, defendant proposes to sell it as a building plot, and he has advertised it for sale, subject to an obligation by the purchaser to leave a space 10 feet wide to connect the lane with the public road. Plaintiff objects, and brings this action for an injunction; and it is contended on her behalf that the defendant is not at liberty to use the site of the intended road for any purpose inconsistent with the intention declared in the original lease. In my opinion that contention is well grounded. The fact that this road is no longer useful to defendant as a road, does not justify defendant in seeking to escape from any binding obligation which the lease imposed upon him. I think there is much force in the argument of plaintiff's counsel, that the descriptive words in this lease should be construed as involving an implied grant to the lessee of an easement over this intersecting space, and as imposing an obligation upon the lessor not to use it in any way that would be inconsistent with the intention declared in the lease. No formal words are necessary in a deed in order to constitute an implied grant or covenant, if the intention is clear.

The authorities which have been cited are *Roberts* v. *Karr* (1); *Harding* v. *Wilson* (2); *Espley* v. *Wilkes* (3); and *Furness* v. *Cumberland Co-operative Building Society* (4).

In *Roberts* v. *Karr* (1) a conveyance described premises as "abutting on a road" on the grantor's soil, and it was held that

(1) 1 Taunt. 495.
(2) 2 B. & C. 96.
(3) L. R. 7 Ex. 298.
(4) 52 L. T. R. 144.

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the grantor was concluded from preventing the grantee coming out into the road over an intervening slip of the grantor's land. In *Harding* v. *Wilson* (1) a lease described premises as "abutting on an intended way of 30 feet wide"; and in an action of nuisance for obstructing the way, it was held that the lessee was entitled at all events to a convenient way. Lord Selborne afterwards, in the *Furness Railway Case* (2), guarded himself from being understood as approving of that decision, if it was intended to decide that the lessee was not entitled to a way of the full width of 30 feet. I may point out that *Harding* v. *Wilson* (1) was an action in which the issue was whether the obstruction was a nuisance. Hence the special materiality of the question of "convenience" in that case. In *Espley* v. *Wilkes* (3) a lease described the premises as bounded on the east and north "by newly made streets, a plan whereof is endorsed on these presents." On the plan the site of the new streets was shown and marked as "new streets." There were in fact no such streets, and the plaintiff afterwards proposed to build upon the intended site of them. The Court, however, held that he was not at liberty to do so, and that the descriptive words in the lease amounted to a grant of a way over the site of the intended new streets.

Furness Railway Company v. *Cumberland Co-operative Building Society* (2) was a decision of the House of Lords, in which the question was whether a railway company had "injuriously affected" certain lands in Barrow-on-Furness by altering the levels of two streets, and so cutting off the access for horses and vehicles from one to the other. In the lease the lands were thus described: "the situation, dimensions, and boundaries whereof are particularly described in the map or plan drawn on these presents, together with all streets, ways, rights, easements, and advantages." The plan showed a piece of land at the intersection of G. street and M. street which were delineated as communicating on the level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of the town, and neither of the two streets had been made or dedicated to the public. Houses were built on the land fronting M. street, and both streets were made and used

(1) 2 B. & C. 96. (2) 52 L. T. R. 144. (3) L. R. 7 Ex. 298.

as streets. Lord Selborne held that the effect of the conveyance and map was that the person making the conveyance "would be bound to the effect that the purchaser, his heirs and assigns, should have such use of these streets as streets communicating with each other, as from the nature of the ground and the circumstances of the case it was reasonably possible that they could have." Lord Selborne proceeded to put the following pertinent questions:— "How is it possible to regard the description of the land as bounded by streets as otherwise than most material to the subject of the contract and to the bargain between the vendor and purchaser? Building land abutting on the street, means having access to and fro by that street." In the course of his judgment, Lord Selborne approved of *Roberts* v. *Karr* (1) and *Espley* v. *Wilkes* (2); and as regards *Harding* v. *Wilson* (3), the doubts which he expressed tend to support the argument on behalf of the plaintiff in the present case.

The defendant's counsel have sought to distinguish these cases by laying stress upon the use of the word "intended" in the present case; and they have referred to *Jorden* v. *Money* (4) and other cases which decide that the doctrine of *estoppel in pais* by representation is applicable only to representations of existing facts, not to representations of mere intention. Promises *de futuro* are binding either as contracts or not at all. But did not the words of this lease involve an implied grant of an easement, and amount to a binding promise not to use this space of 38 feet otherwise than in accordance with the intention so definitely and circumstantially declared? I decide this case rather on the ground of contract than of estoppel. I may, however, observe that *Jorden* v. *Money* (4) was a case to which Lord Selborne so constantly referred that his habit of doing so is recorded by Lord Macnaghten in *Whitechurch* v. *Cavanagh, Limited* (5). Accordingly, it will not be out of place to quote what Lord Selborne is reported to have said in the *Furness Railway Case* (6) at page 146, as to the effect of the word "intended" in the descriptive words of a deed of this kind. "Upon the doctrine of estoppel it is obvious that the use of

(1) 1 Taunt. 495.
(2) L. R. 7 Ex. 144.
(3) 2 B. & C. 96.
(4) 5 H. L. Cas. 185.
(5) [1902] A. C. 117, at p. 130.
(6) 52 L. T. R. 144.

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the word 'intended' is sufficient to prevent the thing operating as a representation that there is a street already existing and actually laid out. Therefore, there being notice that that is not so, the doctrine of estoppel would merely amount to this that the land is to be used as a street." Lord Selborne evidently was of opinion —whether it be put on the ground of estoppel, or of an implied grant of easement, or of covenant—that the words "intended street" in a description of abuttals might create a binding obligation that the land should be used as a street.

There is no hard and fast rule in cases of this kind. Every case turns upon the true construction of the particular deed in question. In the present case I ask myself these questions:—What did the lessor give the lessee the right to expect by the words in which he described the two demised plots? In what sense would the language of this lease describing these two plots be reasonably understood by the lessee? Did the lessor give the lessee the right to expect that this intersecting space would not be used otherwise than as a road intersecting these two plots, and affording access to and from them? Or should the lessee reasonably have understood that the lessor might, at his option and caprice, alter his declared intention to that effect? This is not a case of a place being merely described as bounded by an "intended road"; and I am not called upon to decide what would be the effect of a mere descriptive reference of that kind. The description here is much more definite and circumstantial than that. These two lots were divided in fact by the intersecting space. Lot A was described as bounded "on the east by an intended road to be 38 feet wide intersecting said lot from lot B hereinafter demised." I think the words "to be" are to be noted as indicating something which the lessor declared was to be in existence. According to the words of the lease it was "to be" in existence as an intersecting road of a defined width between the lot which was being demised and another lot which was thereinafter to be demised. Then we find lot B described as bounded on the west "by said intended road, 38 feet wide, intersecting said lot from lot A." Here by very clear words we have the other side of the intended road specified and defined. The intended road is referred to as something which has already been identified in the lease; and it is again described as

an intersecting road, and as intersecting the second lot from the first. Provisions in a deed introduced by the words "to be" have often been regarded as involving binding obligations—sometimes amounting to covenants, sometimes to qualifications of covenants. In the present case, was not the plain meaning of these words that this intersecting space would be available as an intersecting road, that it was "to be" 38 feet wide, and that the lessee would have the benefit of that space as an intersecting road between his two plots, and would have access from the eastern and western end of his two plots to and from and across an intersecting road of that width? The subsequent user and conduct of the parties for thirty years is entirely consistent with this view. Can it be said that this was a mere descriptive detail? It seems to me to have been a statement calculated, and I have little doubt intended, to affect the value of the premises, and to induce the lessee to the contract.

An intersecting road at this spot is no longer of any use to the defendant, owing to the abandonment of the remainder of his building-scheme. But it continues to be of importance to the plaintiff; and the law does not permit a grantor or covenantor to break his promise as soon as it no longer suits him to observe it. I hold that, from the words of this deed, describing with such particularity the abuttal of these two building plots respectively upon an intended intersecting road to be 38 feet wide, there is to be implied a grant of an easement of way to and from and across an intersecting road of that width. Every grant of an easement carries with it a negative obligation to refrain from doing that which is inconsistent with the grant. In the present case the implied grant of this easement imposed upon the grantor a binding obligation not to use this intersecting space for any purpose inconsistent with the grant which is to be implied from the language of the lease. That being so, I am of opinion that plaintiff is entitled to an injunction.

Solicitors for the plaintiff: *Peebles & Knox.*
Solicitor for the defendant: *Macnamara.*

J. MACM.

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IN THE MATTER OF THE ESTATE OF THE HONOURABLE CHARLES WILLIAM WHITE AND ANOTHER, OWNERS; THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY, PETITIONERS.

Land Purchase Acts—Irish Land Act, 1903, *ss.* 6, 7—"*Estate*"—*Wholly untenanted lands—Power of the Estates Commissioners to purchase.*

The Estates Commissioners have power to purchase lands which are wholly untenanted, under the provisions of sect. 7 of the Irish Land Act, 1903.

Semble: The Estates Commissioners have similar powers under sect. 6.

QUESTIONS submitted to the Judicial Commissioner under section 23 (1) of the Irish Land Act, 1903. From the memorandum of the Estates Commissioners the following facts appeared. The lands in question, consisting of part of the lands of Ballina, in the barony of Clonderalaw and county of Clare, containing 186A. 1R. 15P., were all untenanted, and were for sale, in the above matter, in the Court of the Land Judge. On March 13, 1905, an order was made by the Land Judge that the solicitors having carriage of the sale should be at liberty to apply to the Estates Commissioners to issue a request under section 7 of the Irish Land Act, 1903, in respect of these lands. A request was duly issued by the Estates Commissioners on April 5th, 1905. The lands had been inspected, and the Estates Commissioners were in a position to make an offer in respect of them. The lands were not required for the purpose of facilitating the resale or redistribution of particular estates purchased or proposed to be purchased at present by the Land Commission, but they might be said to be required for the purpose of facilitating the resale and redistribution of estates generally that might be purchased or proposed to be purchased by the Land Commission.

The Estates Commissioners proposed, if they could purchase the lands, and were declared the purchasers thereof, to resell the same to a person coming within the provisions of section 2 (*d*).

The following questions were submitted :—

Can the Estates Commissioners purchase lands which are all untenanted under the provisions of section 7 of the Irish Land Act, 1903 ?

If they cannot purchase the lands under the provisions of section 7, can they purchase them under the provisions of section 8, having regard to the purpose for which they are required ?

If they are purchased under the provisions of section 8, is it open to the Commissioners to declare the lands so purchased fit to be regarded as a separate estate for the purposes of the Act ?

H. D. Conner, K.C., for the vendor :—

Section 7 is wide enough to cover the present case. It is a complete section in itself by reference to the preceding sections, and is not affected by the provisions of section 8. The latter section deals with an entirely different subject-matter, and confers additional powers on the Land Commission to those given under sections 6 and 7.

Matheson, K.C., and *Edmond Coll*, for the Treasury :—

There is no power in the Land Commission to purchase an estate consisting of wholly untenanted lands, for the purpose of reinstating evicted tenants, under section 7. The Land Commission have only power to purchase wholly untenanted lands under section 8, for the purpose of facilitating the resale of a particular estate ; but they must have a particular estate in view. Sections 6 and 7 are confined to estates which are at least partly tenanted. Section 8 shows that this is so by conferring special powers on the Land Commission, under certain conditions, to purchase wholly untenanted lands. Section 6 can have no application unless there are tenants on the estate to whom the provisions with regard to three-fourths are capable of being applied. If wholly untenanted lands can be purchased under sections 6 and 7, section 8 is superfluous.

R. R. Cherry, K.C., for the evicted tenant :—

On the narrowest construction of section 98 the subject-matter of what can be included in an estate need not necessarily be confined to lands which are even partially tenanted. Section 12

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affords a strong argument, as, under that section, the Land Commission are, for the purposes therein contained, placed in the same position as the Congested Districts Board.

Cur. adv. vult.

Nov. 3.

MEREDITH, J.:—

I take the case submitted by the Estates Commissioners as read. I incorporate it in my judgment. I wish to say that I adhere to the statement which I have so often made, that it is no part of my jurisdiction to act as a guide to the Estates Commissioners on mere abstract questions of law, and that I will only give a decision under section 23 when I have got a concrete case, *i.e.* when facts are stated in respect of which a definite question of law arises. In this case (as I read the memorandum of the Estates Commissioners) a concrete case is involved in the facts as stated, and a question of law which I can decide is clearly indicated. Having stated the facts, and having made a reference to sect. 8 of the Act of 1903, the Estates Commissioners say "the Estates Commissioners propose, if they can purchase the lands, and are declared the purchasers thereof, to resell the same to a person coming within the provisions of sect. 2 (1) (*d*)." Now, sect. 2 (1) (*d*) has been read and very fully discussed. I desire to call attention to the fact that the sub-section is wide in its terms, and embraces (*inter alia*) the case of a person who, within twenty-five years before the passing of the Act, was the tenant of a holding to which the Land Law Acts applied, and who was not, at the date of the purchase, the tenant or proprietor of that holding; also to the case of a person nominated by the Land Commission as the personal representative of any such tenant who might unhappily have died before the passing of the Act of 1903. No preference is given to any person, or class of persons, coming within the sub-section. Now, I take it to be clearly indicated by the memorandum of the Estates Commissioners that there is an individual person coming within the class (*d*) to whom they intend to resell if they can purchase the lands. The first question of law asked is: "Can the Estates Commissioners purchase lands which are all untenanted under the provisions of sect. 7 of the Irish Land Act, 1903?" I read the question in connexion with the statement in the memorandum, viz. that if they purchase they propose, which I

take to mean intend, to resell to a person coming within the provisions of sect. 2 (1) (*d*). Now, I sit merely to determine law, and I cannot, as I have often said, allow my mind to be affected by extraneous matters of any kind. No statement made while a Bill was passing through Parliament can be allowed to affect the mind of a Judge who is engaged in construing the finished work of Parliament as embodied in an Act placed upon the Statute Book. What Parliament intended must be ascertained from what Parliament has actually set forth in the statute. I do not cast any doubt on the authorities cited by Mr. Cherry. They are referred to in many of the text-books. But when all is said, the question I have to determine is, whether the Legislature has, as a matter of law and legal construction, conferred on the Land Commission power to purchase wholly untenanted lands under the provisions of sect. 7 of the Act of 1903? For, in my judgment, I have not sufficient materials before me to enable me to offer any opinion to the Estates Commissioners as to whether the case might have been brought within the provisions of sect. 8.

Now, the Legislature has given to the Estates Commissioners wide discretionary powers. It is unnecessary to go over the familiar ground as to the meaning of the word "discretionary," and as to the restrictions which the law places, in certain events, on the exercise of judicial, or semi-judicial, discretion. I pass from that and come to the question of legal construction.

No doubt sect. 98 is the key to the Act of Parliament:—"The expression 'estate' in Part I. of this Act means any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act, and the said expression in Part II. of this Act has the same meaning, with the substitution of the Congested Districts Board for the Estates Commissioners." I regard the coupling of the Congested Districts Board with the Estates Commissioners as of some importance, because I find in sect. 77 that for the purpose of the purchase by the Congested Districts Board of an estate from the Land Judge, "the provisions of this Act with respect to the powers and duties of the Land Judge in relation to an offer of the Land Commission, shall apply with the substitution of the Congested Districts Board for the Land Commission."

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If my recollection is not at fault, there has been one case, at all events, in which an estate consisting wholly of untenanted lands was purchased by the Congested Districts Board from the Land Judge under the Act of 1903. At least on that point, there is no doubt of the possibility of the Board being able to do so. Have the Estates Commissioners power to do so? I do not suppose that Mr. Justice Ross would have given the solicitor having carriage liberty to apply to the Estates Commissioners to issue a request under sect. 7 for the purchase of these lands, unless he considered that the proceedings could have been carried out. I do not suggest that the order of Mr. Justice Ross amounts to a decision upon the point, but it is an indication of the view that the learned Judge took. In that light it is satisfactory to me to feel that the opinion of Mr. Justice Ross is not likely to differ from my own.

Now, sect. 7 says:—[His Lordship read the section.] I have no doubt that the word "estate" in the opening clause of the section refers to the estate which is the subject-matter of the order for sale in the Land Judge's Court. Reading sect. 98 into sect. 7, I come to the conclusion that the Estates Commissioners have power to make an offer to the Land Judge for the purchase of any part of the estate under his control, that is to say, any part of the estate which is the subject-matter of the absolute order for sale. Further, in my opinion, the Estates Commissioners have power to declare any such part of the estate a "separate estate" under sect. 98 for the purposes of the Irish Land Act, 1903. I am prepared so to hold, unless I am prohibited by anything in sect. 7, or in any of the preceding or subsequent sections, from so holding. There is nothing in section 7 to prohibit me except it be sub-section (2) which provides that "the Land Commission, after causing the estate to be inspected, may, subject to the provisions of the last preceding section, as to undertakings to purchase holdings and resale without prospect of loss, make an offer to the Land Judge for the purchase of the estate *or of any part thereof.*" I go back to sect. 6 and I find there that, before the Estates Commissioners can make an offer to anyone for the purchase of an estate, in estimating the price they "shall have regard to the foregoing provisions of this Act in respect of advances, and to the

prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate." Further there must be an undertaking by tenants on the estate to the extent of not less than three-fourths in number and rateable value to purchase from the Land Commission their holdings or other designated parcels of land in lieu thereof for the respective amounts on the basis of which the price of the tenanted portion of the estate was estimated by the Commission. I cannot agree with the argument of Mr. Matheson and Mr. Coll, that of necessity, and beyond all doubt, section 6 can have no application unless there are *tenants* on the estate to whom the provisions with regard to three-fourths are capable of being applied. I mentioned the case of only one or two tenants on an estate. It might be said that the Estates Commissioners are not likely to purchase in such a case; but what is there in the statute to prevent them? The entire estate may have been set in one lot to one tenant; what is there to prevent it being sold and resold under section 6? I see nothing to prevent the sale. But Mr. Matheson contends that, even if one tenant would suffice, there must, at least, be in existence that one tenant. The logical result of that argument seems to be that only a composite estate, consisting of partly tenanted and partly untenanted lands, can be dealt with under section 6. For the section says that the Commissioners shall have regard to the prices which the "tenants" and "other persons" are willing to give for the "holdings" and "other parcels of land" comprised in the estate, and speaks of the "tenanted portions" of the estate. If the lands are wholly tenanted, there can be no "other persons," and (applying Mr. Matheson's argument in all its rigour) no sale or purchase within the contemplation of the Legislature under section 6 can take place. But no one has ever suggested that an estate which is wholly in the possession of tenants cannot be purchased under section 6.

Well, I turn to sect. 2. Under this section, in the case of the sale of an estate (meaning an "estate" as defined by sect. 98), advances under the Land Purchase Acts may be made for the purchase of parcels thereof by the following persons:—(*a*) "A person being the tenant of a holding on the estate"—that obviously applies to a case where there are already tenants on the

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estate; (*b*) "a person being the son of a tenant of a holding on the estate"—that also applies where the estate is partly tenanted; (*c*) "a person being the tenant or proprietor of a holding not exceeding five pounds in rateable value, *situate in the neighbourhood of the estate*"; and (*d*) the class which may be shortly summarised as "evicted tenants." There is no preference or priority shown or expressed by the Legislature as between these several classes of persons. I find that class (*d*) is a wide one, and further that the class is not (as I understand it) confined to the former tenants on the estate that is being dealt with, but to former tenants of holdings "to which the Land Law Acts apply" in any part of Ireland. It thus appears that the class is numerous, and only restricted in point of area to any place within the limits of Ireland.

There is nothing in the section to show that, in order to benefit persons coming within class (*c*) or (*d*), the Estates Commissioners must first have some portion of the estate occupied by tenants of holdings. If there are tenants on the estate, then the provisions with regard to tenants must apply. If there are no tenants upon the estate, then the provisions and conditions which are referred to in sect. 6, and by reference in sect. 7 with regard to offers from "other persons," come into play. If I may summarise what is in my mind, the words in sect. 6 (1) "tenants and other persons" mean "tenants or other persons." If I am right, I cannot see that any injustice will be done to anybody merely because the Estates Commissioners wish to exercise their jurisdiction with regard to untenanted lands. The case before me is one in which they intend to resell to an evicted tenant, *i.e.* a person who comes within the category of "other persons."

With regard to sect. 8, Mr. Matheson and Mr. Coll contend that if Mr. Conner's argument is correct, sect. 8 is superfluous. I do not agree. It seems to me that sect. 8 must be read in connexion with sect. 12 (2), which provides that for the purpose of carrying the latter section into effect, the Land Commission shall have all the powers for facilitating resales of land conferred on the Congested Districts Board by sections 1 and 2 of the Congested Districts Board (Ireland) Act, 1901, as amended by the Act of 1903, and these sections, as so amended, shall apply accordingly, with the substitution of the Land Commission for the

Congested Districts Board. Turning to sections 1 and 2 of the Congested Districts Board (Ireland) Act, 1901, I find that sect. 8 of the Act of 1903 includes subject-matter distinct from sections 6 and 7; and the argument that the section was unnecessary, and that there was no object in introducing it, is not a sound argument. I answer the first question in the affirmative. Questions 2 and 3 do not arise, and it is unnecessary to answer them.

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From this decision the Treasury appealed (1).

Appeal. Dec. 18, 19. 1906. Jan. 15.

Ronan, K.C., Matheson, K.C., and *Edmond Coll*, for the Treasury.

Conner, K.C., for the vendor.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*), for the evicted tenant.

The arguments were the same as in the Court below.

A preliminary objection was raised that no appeal lay from a decision of the Judicial Commissioner under sect. 23, sub-sect. 1, which was overruled. The question is dealt with in the judgments of Walker, C., and Holmes, L.J.

WALKER, C.:—

1906. Jan. 15.

In this case the Estates Commissioners, under the provisions of section 23, sub-section 1, of the Land Act of 1903, referred, for the decision of the Judicial Commissioner, the following questions of law:—

(1) Can the Estates Commissioners purchase lands which are all untenanted, under the provisions of section 7 of the Irish Land Act, 1903?

(2) If they cannot purchase the lands under the provisions of section 7, can they purchase them under the provisions of section 8, having regard to the purpose for which they are required?

(3) If they are purchased under the provisions of section 8, is it

(1) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

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Walker, C.

open to the Commissioners to declare the lands so purchased fit to be regarded as a separate "estate" for the purposes of the Act?

It appears that lands called Ballina, in the county of Clare, are being sold in the Land Judge's Court, and an absolute order for the sale was made. Portion of the lands which was in the hands of the tenants was sold; and the residue which contains 186A. 1R. 15P. is still for sale, and has no tenants upon it. On the 13th March, 1905, an order was made by the Land Judge that the solicitors having carriage should be at liberty to apply to the Estates Commissioners to issue a request under section 7 of the Irish Land Act, 1903, in respect of the untenanted lands. A request was issued by the Estates Commissioners on the 5th April, 1905. The lands have been inspected, and the Estates Commissioners are in a position to make an offer for the lands. The Estates Commissioners then, for the guidance of the Judicial Commissioner, made the following statement:—

> "The said lands are not required for the purpose of facilitating the resale or redistribution of particular estates, purchased, or proposed to be purchased, at present by the Land Commission; but they may be said to be required for the purpose of facilitating the sale and redistribution of estates generally that may be purchased, or proposed to be purchased, by them. The Estates Commissioners propose, if they can purchase the lands, and are declared the purchasers thereof, to resell the same to a person coming within the provisions of section 2 (1) (d)."

Mr. Justice Meredith has answered the first of the questions submitted to him in the affirmative, and this rendered it unnecessary for him to consider questions 2 and 3.

The Treasury have appealed from that decision; and upon the argument of the appeal we heard counsel for the owner and also the present Attorney-General for a purchaser. At the outset a preliminary objection was taken that no appeal lay to this Court from a decision of the Judicial Commissioner, under section 23 (1); but we held that we were bound to hear the appeal, having regard to the result of the decision in *Talbot Crosbie's Estate* (1), Lord Justice Holmes and I having surrendered our views in deference to the opinion of Lord Justice Fitz Gibbon, whose judgment is reported. The argument then proceeded upon the point of law.

(1) [1905] 1 I. R. 570.

This case is an important one; but it lies within a small compass, and depends upon the construction of a few sections contained in Part 1 of the Land Act of 1903. One mode of carrying out the policy of that Act is by the Estates Commissioners themselves purchasing an estate and then reselling it; and such a purchase may be made direct from the owner under the provisions of section 6, or they may buy from the Land Judge under the provisions of section 7, and under section 8 they are given a general power to purchase any untenanted lands. It will be necessary for me to refer minutely hereafter to the provisions of these sections. There is in the Act an absolute negation of the power to purchase, which is contained in section 10 in clear language, viz.: "No estate shall be purchased by the Land Commission which is not in the main agricultural or pastoral." That is the only express limitation of their powers as regards the character of the lands to be bought.

The objects which the Estates Commissioners have in view in making the contemplated purchase are those specified in sect. 2 (1) of the Act; and this section includes a case where the Estates Commissioners, having themselves acquired by purchase an "estate" translated by the Act into "any lands which the Estates Commissioners have declared fit to be regarded as a separate estate for the purposes of the Act," are reselling. In such a case they can, in consideration of purchase-money advanced by the State, sell part of such acquired land to a class of persons who are outside the class of tenants buying their own holdings, and under (*d*) they can sell to a person who, within twenty-five years before the passing of the Act, was the tenant of a holding to which the Land Law Acts apply, and who is not, at the date of the purchase, the tenant or proprietor of that holding. This is mainly directed to the case of evicted tenants, but it is by no means limited to the restoration of a former tenant of a holding on the lands sold.

It is plain that the objects to be attained under section 2 are purposes of Part I. of the Act, which the Estates Commissioners are justified in making purchases for; and seeing that clauses (*c*) and (*d*) can only be provided for out of untenanted land, it would be strange if we did not find in the Act powers for

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the Estates Commissioners to acquire such untenanted land, and thus peaceably carry out the policy of enlargement of holdings and restoration to holdings; and if they can acquire an estate, part of which is untenanted, it would seem equally strange if they could not acquire an estate consisting wholly of untenanted land, and thus have larger material to draw on to satisfy the objects of clauses (*c*) and (*d*). The Court, therefore, I think, should approach the sections which are alleged to exclude their powers with a disposition to scrutinise narrowly any limitation alleged to be contained in them.

I have pointed out that the Estates Commissioners may purchase an estate from the owner under section 6, or in the Land Judge's Court under section 7; and under section 8 they are given a general power to purchase any untenanted land which they consider necessary for the purpose of facilitating the resale or redistribution of estates purchased, or proposed to be purchased, by them. Having regard to the statements in the memorandum, I am disposed to agree with Mr. Justice Meredith that the purchase in the present instance cannot come under section 8. That section could at all events afford a useful supplementary power if an estate acquired by them under section 7 was wholly tenanted; and I think section 8 can be usefully had regard to when we are considering whether any exclusion of power to buy land wholly untenanted can be found in section 7.

Coming now to sect. 7 itself, it has, within its very words, "appeared to the Estates Commissioners expedient to take steps with a view to the purchase for the purposes of Part I.," of this estate for the sale of which an absolute order for sale has been made under the Landed Estates Court Act. So far the case is within the very words of the section, and its acquisition would satisfy the policy and declared objects of sub-sects. 1 and 2 of sect. 7. The contention of the appellants, however, is that they cannot buy it, having regard to the provisions of sub-sects. 1 and 2 of sect. 7, and of sect. 6, and they contend that these sub-sections are sufficient to exclude from sect. 7 lands wholly untenanted. I think the best course is to take sects. 6 and 7 in their order.

In sect. 6, where the Estates Commissioners are buying from the owner, they are to estimate the price, having regard (*inter alia*) "to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate." Those words refer to sect. 2, in which we find "for the purchase of parcels thereof"; and sub-sect. 3 of sect. 2 makes the Land Purchase Acts apply to the sale of a parcel of land in pursuance of the section in like manner as if the same was a holding; and sub-sect. 2 of sect. 6 uses the words "on the basis of which the price of the tenanted portion of the estate was estimated by the Commission." No doubt the general idea running through the sections is a case of land partly tenanted and partly untenanted; but is the existence of such a state of things a condition of power to buy? There is nothing to prevent the Estates Commissioners declaring, under sect. 98, lands wholly untenanted to be fit to be regarded as a separate estate; assuredly there is nothing in the policy of the Act to prevent them.

Passing on to sect. 7, it is clear that unless the reference to, and incorporation of, sect. 6 limits it, as contended, there is nothing in sect. 7 itself to do so. Reliance was placed on the words in the first sub-section, "including a schedule in the prescribed form of the tenancies thereon, and a statement of the superior interests (if any) to which the estate is subject," and the omission of the words "if any" when the tenancies are referred to. If that argument were pushed to its logical extent, it would make the section only apply to lands wholly in the hands of the tenants; but that cannot be, having regard to sect. 6, sub-sects. 1 and 2, and the use of the words "other persons." The words only mean, I think, "including a schedule in the prescribed form of such tenancies as there are thereon." Sub-sect. 2 of sect. 7 refers to sub-sect. 1 of sect. 6, which speaks of "the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate." It is not disputed that under sect. 7 an estate may be bought which is only partially tenanted; and, therefore, the existence of one tenant on a part would satisfy the argument. All the provisions relied on are applicable, and have full force when there is a subject-matter for their application; but in my opinion they cannot be taken to

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exclude the power of buying the very subject which would most effectually serve the policy which enters so largely into the Land Act.

We had occasion in *Galway's Estate* (1) to consider and give weight to the large discretionary language of sect. 7, viz.:— "Where it appears to the Land Commission expedient." The Estates Commissioners are made the sole judges of the expediency, therefore I think there is everything in the way of policy to include untenanted land, and there is nothing in the language of the sub-sections relied on which is sufficient to exclude it. There is a subject-matter on which they can operate when the subject-matter exists, and sect. 10 shows that the framers of the Act knew how to use clear words of exclusion when lands of a particular character were desired to be excluded. I concur with Mr. Justice Meredith that sect. 8 is not superfluous. It is, I think, supplementary to the other powers by enabling small parcels of land on which there are no tenancies to be acquired. The word "estate" is not used, but only "land"; and the mode and place of acquisition are not specified, nor any conditions as to ascertainment of price mentioned. Its existence certainly does not cut down what may be done under sect. 7. Upon the whole, I entertain no doubt that the decision of Mr. Justice Meredith was right, and that the appeal should be dismissed. We give Mr. Conner's clients their costs, but we cannot give costs against the Treasury.

FITZ GIBBON. L.J.:—

The Lord Chancellor has discussed the material sections of the Land Act, 1903, and as Holmes, L.J., also will refer to them, I shall not go over the same ground.

The only difficulty which I feel is to assure myself that we are not called on to answer an abstract question. Meredith, J., seems to me to have been driven to infer a good deal from the memorandum of the Estates Commissioners, in order to show that he was dealing with a concrete case; but having regard to the peculiar jurisdiction and constitution of the Land Commission,

(1) *Ante*, p. 137.

we should make every possible effort to put a construction upon the memorandum which will enable us to answer the questions put, and I think we may and ought to read it as amounting to a categorical statement to this effect:—

We, as a matter of fact, think it expedient to purchase the estate of Ballina, the subject of these proceedings, for the purposes of the Land Act, 1903, Part I., and the particular purpose for which we want it is, in our opinion, within the terms of section 2. But we further say that there is a sense in which the purchase will facilitate the redistribution of estates—not particular estates, but estates generally—purchased, or proposed to be purchased, by us, and, if necessary, we rely on that as sufficient to justify us in buying these particular lands.

The particular purpose under section 2 I take to be the pur pose of reselling land to a person who comes within the description given in sub-section (1) (*d*).

To come within this description, the person for whom the land is bought must, at the date of the purchase, be a person who then has no land, but who, within twenty-five years before August 14, 1903, "*was* the tenant of a holding to which the Land Law Acts apply," but who before the purchase had ceased to be such tenant. Speaking for myself, I should be prepared to say that circumstances might exist which would justify the Land Commission in saying "the last place in the world where we should think it 'expedient' to replant an evicted tenant is the holding which formerly belonged to him." It might easily be found impossible so to do, because that holding might have been relet to another tenant who could not be ejected or bought out; and if the estate which comprised the old holding was about to be purchased by the occupiers through the Land Commission, it does seem to me that the resale or redistribution of that estate might well be facilitated by enabling the Land Commission to buy a piece of untenanted land elsewhere, in order to plant some evicted tenant or tenants upon it, and under such circumstances the purchase of that land might, in my opinion, be justified under sect. 8. However, I read the memorandum in this case as candidly saying that this state of facts does not exist here, but that what is desired is to buy the land, which the Land Commission is prepared to declare to be "an

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estate," merely for the purpose of providing a new holding for an ex-tenant, irrespectively of any purpose of facilitating a dealing with the estate upon which he formerly was a tenant.

This brings us to the simple question, Can the Land Commission buy untenanted land for an evicted tenant which does not belong to an estate of which some other portion is tenanted? The existence of sect. 8 appears to me to supply a strong argument to show that Meredith, J., was right in holding that, in the case I have put, such a purchase is within the powers of the Land Commission, though not acting under sect. 8. The object of sect. 8 is to authorise the purchase of the whole of an estate which is in the main tenanted, notwithstanding that part of it consists of untenanted land. In short, it is to avoid a difficulty like that which also existed under the Act of 1881, when it was decided that a fair rent could not be fixed on a holding of which any part was "demesne land." Section 8, in my opinion, was intended to give jurisdiction to deal with the tenants upon an estate of which a considerable portion was tenanted, and at the same time to buy any untenanted land which was included in it. In that case, the Commissioners were empowered to buy the whole estate, to deal with the tenants holdings under the Purchase Acts, and to deal with the untenanted portion to the best advantage. In that view, sect. 8 is an independent and useful provision.

As to sections 6 and 7, I concur with Meredith, J., and the Lord Chancellor, and I see nothing in them to prevent the Estates Commissioners, in the concrete case, from buying a piece of untenanted land which they declare to be "an estate," if it appears to them to be expedient to buy it for the purpose of making an advance for the repurchase of it to a person who is within sect. 2 (1) (*d*).

That appears to me to dispose of the case.

HOLMES, L.J.:—

The question arising in this appeal was referred by the Estates Commissioners to the Judicial Commissioner pursuant to the Irish Land Act, 1903, sect. 23, sub-sect. 1.

I agree with Mr. Justice Meredith that the only matter that can be referred to him under this provision is a question of law

arising on a state of facts actually existing, and, like him, I turn to the memorandum of the Estates Commissioners to ascertain the facts that have led to the reference; but before stating them, I wish to deal briefly with the preliminary objection taken to the Court entertaining the appeal. This was argued very elaborately by the Attorney-General, nor can he be blamed for pressing the Lord Chancellor and myself to adopt the reasoning of Palles, C.B., in *Talbot Crosbie's Estate* (1) in preference to that of Fitz Gibbon, L.J. He was not, however, aware that when we gave a somewhat hesitating assent to the proposition that an appeal lay in that case, we were of opinion that it logically followed that every decision of the Judicial Commissioner under the sub-section in question was subject to an appeal in this Court. I see no reason for now altering the view I then entertained; and I am unable to add anything useful to the judgment of Lord Justice Fitz Gibbon on this subject. The facts of the present case are very simple. There is an order for sale in the Land Judge's Court of the lands of Ballina, in county Clare, containing about 166 acres, not subject to any tenancy. The solicitor having carriage of this sale obtained leave from Mr. Justice Ross to apply to the Land Commission to take steps to purchase this property in the manner provided by section 7 of the Act, and thereupon the Estates Commissioners forwarded to the Land Judge the request thereby prescribed.

Having obtained the information asked for, and after inspection of the lands, they are prepared to make an offer to purchase with the object, if their offer is accepted, of reselling to a person who, within twenty-one years before the passing of the Act, was a tenant of a holding to which the Land Law Acts apply, and who is not now the tenant or proprietor of that holding. Although the name of this person is not given, it is fair to assume that the Estates Commissioners have in view a particular individual coming within the above description who is willing to buy on such terms as may be arranged pursuant to the provisions of the Act. The Commissioners, however, were in doubt whether the 7th section authorises them to purchase a parcel of land wholly untenanted, and accordingly they referred this question to the Judicial Com-

(1) [1905] 1 I. R. 570.

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missioner, who has replied in the affirmative. From this adjudication the Treasury has taken this appeal, the result of which depends on the construction to be given to two or three provisions of the Act of 1903.

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Section 6 enables the Land Commission to purchase an estate directly from its owner with a view to its resale. "Estate" here evidently means an estate as defined by section 98—that is to say, "any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act." It is quite clear that a parcel of land, portion of which is untenanted, may be thus declared an estate, and purchased from the owner under section 6. That the principal object of this and the following section is to enable the Estates Commissioners to acquire some untenanted lands is shown by section 2, which enumerates four classes of persons to whom advances may be made by the Land Commission for the purpose of purchasing vacant lands. I cannot believe that the Legislature contemplated that the purchases here referred to could be made to any extent from private owners. To make the section of practical value, it was necessary to give power to a public department to buy vacant lands for the purpose of resale to the persons described; and this was done by sections 6 and 7. But it is unnecessary to rest an argument on the policy of the Act, inasmuch as the first clause of section 6 puts the matter beyond controversy by directing the Land Commission, in estimating the purchase-money to be paid to the owner, to have regard to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate. The distinction is here plainly drawn between "tenants" and other persons not tenants, between parcels of land subject to tenancies and parcels not so subject.

Up to this point, I think that there is no controversy, and that what I have said would be accepted by both sides. The argument on behalf of the Treasury turns on sub-section 2, which enacts that if the owner "agrees to sell the estate at the estimated price, and if tenants of holdings on the estate to the extent of not less than three-fourths in number and rateable value, undertake to purchase from the Land Commission their holdings or other designated parcels of land in lieu thereof for

the respective amounts on the basis of which the price of the tenanted portion of the estate was estimated by the Commission," the purchase may be carried out. It is contended on the one hand that this provision makes the purchase conditional on some portion of the estate being let to tenants, and on three-fourths of such tenants, ascertained as prescribed, agreeing to purchase their holdings.

It is said, on the other hand, that the condition as to the three-fourths only comes into operation where there are tenants, and that the existence of tenants is not part of the condition. I have no doubt that it was contemplated that in most instances the lands to be purchased under this section would be partly tenanted and partly untenanted. This idea runs through the section; but the question is whether the language is such as to enable the Land Commission in a fit case to purchase a parcel of land declared to be an estate, whether it be all let to tenants, or no portion of it be so let. The complete discretion given to the Estates Commissioners in declaring lands an estate, and the general terms with which sect. 6 opens, seem to me to be inconsistent with the limitation of the authority to purchase contended for by the appellants, and I am of opinion that the language of the section does not justify this construction. I read it as meaning that the Land Commission may buy from the owner any lands which that body declares fit to be regarded as a separate estate, tenanted or untenanted, subject to the proviso that if there be tenants the condition in sub-sect. 2 is to apply. If this be the true construction of sect. 6, sect. 7, under which it is proposed to buy the lands of Ballina, presents no difficulty. That section relates to the purchase by the Land Commission of lands ordered to be sold in the Land Judge's Court. Where, in its opening words, it speaks of "an estate for the sale of which an absolute order has been made," it refers to the property, whatever it may be, ordered to be sold in the Land Judge's Court, but the Land Commission may make an offer for the whole, or any part thereof, subject to the provisions of the 6th section, as to undertakings to purchase holdings.

This brings into purchases in the Land Judge's Court the conditions with which I have been dealing, and which must receive the same construction in the two sections. If there was

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nothing else in the Act relating to purchase by the Land Commission, I should have come to the conclusion I have stated with little hesitation; but sect. 8 has caused me considerable difficulty. The Land Commission are thereby expressly authorized to purchase any untenanted land which they consider necessary for the purpose of facilitating the resale or redistribution of the estates purchased, or proposed to be purchased, by them. The Estates Commissioners have, as a further or alternative question, asked the Judicial Commissioner whether the lands of Ballina can be purchased under this section; but Mr. Justice Meredith having held that the purchase can be made under sect. 7, has not answered the second inquiry; nor do I see how he could have replied in the affirmative, having regard to the statement in the memorandum of reference that the lands are not required for the purpose mentioned in the section. My difficulty arises from the mere presence of this section in the Act. If lands wholly untenanted can be bought under the two preceding sections, what was the necessity for sect. 8? In answer to this question, it is said that it was required to enable the Land Commission to purchase small parcels of land which it would be impossible, or at least unreasonable, to declare an estate. I think that the purpose specified in the section goes to show that the lands to which it is intended to apply are of this character; and, moreover, the absence of this provision in the previous sections as to resale without prospect of loss, supports this view. On the whole, I am disposed to think that the section was introduced by way of precaution, and to make it clear that the Land Commission can buy a few acres of land adjoining or near an estate purchased by them, when the acquisitions of such land will facilitate the work of resale or redistribution. In any case I am not prepared to allow an ambiguous provision to affect what seems to me to be the reasonable construction of the 6th and 7th sections. I, therefore, am of opinion that the appeal ought to be dismissed.

Solicitor for the Treasury: *Malachi Kelly.*
Solicitor for the evicted tenant: *V. Kilbride.*
Solicitor for the vendor: *J. Ross Todd.*

G. Y. D.

DUFFY *v.* DUFFY.

Barton, J.
1905.
July 26–28.

Appeal.
Dec. 6, 7.

Limitations, Statute of—Adverse possession—Possession of land by one of next-of-kin of deceased tenant—Character of such possession—Other next-of-kin in possession—Grant of administration more than twelve years from death of intestate—Graft.

J. D. died intestate on the 28th August, 1885, leaving three children, Thomas, Mary, and Francis, all of whom were of age. He was possessed of three farms in the county of Monaghan, on the estate of the Marquis of Bath, and also of farming stock and chattels. At the time of his death Thomas and Francis D. were in delicate health, and the farms were managed by the daughter, Mary D. After his death the Bath estate was sold to the tenants under the Land Purchase Acts, and conveyances of two of the farms were taken to Thomas D. in June and July, 1887, and a conveyance of the third was taken to Mary D. in June, 1887. By the same conveyances the lands were mortgaged to the Land Commission, to secure the payment of the purchase annuities.

In 1898 Mary D. became delicate in health, and Francis, who had recovered, took up the management of the farms, and possessed himself of all the assets of his father. On the 21st March, 1899, Francis D. obtained a grant of administration to his father, and in the schedule of assets he returned the farms as assets.

In 1900 the annuities payable to the Land Commission fell into arrear, and the three farms were sold by auction to pay the arrears. They were bought in by Francis D. for the instalments due on each; and, in April, 1900, and in January and February, 1901, he obtained conveyances to himself of the three farms in fee. Francis D. died on the 2nd October, 1903, having, by will, left all his property to his wife (the defendant):—

Held (affirming the decision of Barton, J.), that the purchase by Francis D. of the farms from the Land Commission was a graft on the former interests; that the farms were assets of J. D., and that Francis D. had not acquired a title to the farms under the Statute of Limitations.

JAMES DUFFY, who died intestate on the 28th August, 1885, left him surviving three children, his sole next-of-kin, Thomas Duffy, Mary Duffy, and Francis Duffy. He was possessed of three farms in the county of Monaghan, held under the Marquis of Bath—(1) the farm of Dunanny, containing 13A. 2R. 10P., held

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from year to year at the yearly rent of £13 9*s.*; (2) the farm of Cordrummons Upper, containing 33A. 1R. 3P., held from year to year at the rent of £38; (3) the farm of Blittoge, containing 29A. 2R. 35P., held from year to year at the yearly rent of £27 18*s.* There was a considerable amount of farming stock, chattels, and crops on the said farms.

Shortly after the death of James Duffy, the Bath estate, including the said holdings, was sold to the tenants under the provisions of the Land Purchase (Ireland) Acts. By indenture, dated the 18th June, 1887, and made between the Marquis of Bath, of the first part, Thomas Duffy (the plaintiff), of the second part, and the Irish Land Commission, of the third part, the Marquis of Bath conveyed Dunanny to the plaintiff, Thomas Duffy, in fee, subject to the payment of an annuity of £8 1*s.* 8*d.* to the Irish Land Commission for forty-nine years from the 1st November, 1887; and Thomas Duffy thereby mortgaged the lands to the Land Commission to secure the annuity.

By another indenture, dated the 9th July, 1887, made between the Marquis of Bath, of the first part, Thomas Duffy (the plaintiff), of the second part, and the Irish Land Commission, of the third part, the Marquis of Bath conveyed the lands of Cordrummons Upper to the plaintiff, Thomas Duffy, in fee-simple, subject to the payment of an annuity of £22 16*s.* to the Irish Land Commission for forty-nine years from the 1st November, 1887, payable by equal half-yearly payments; and Thomas Duffy thereby mortgaged the lands to the Irish Land Commission to secure the annuity.

By another indenture, dated the 18th June, 1887, made between the Marquis of Bath, of the first part, Mary Duffy, of the second part, and the Irish Land Commission, of the third part, the Marquis of Bath conveyed the lands of Blittoge to Mary Duffy in fee, subject to the payment of an annuity of £16 15*s.* 2*d.* to the Irish Land Commission for forty-nine years from the 1st November, 1887, payable half-yearly; and Mary Duffy thereby mortgaged the lands to the Irish Land Commission to secure the annuity.

At the time of the death of James Duffy, Thomas Duffy (the plaintiff) was in delicate health, and continued to be so until shortly

before the bringing of the action; the said Francis Duffy was also in delicate health up to the year 1898; accordingly, from the death of the said James Duffy up to the year 1898 the said farms were worked by the plaintiff, Mary Duffy, when she became ill.

In 1898 Francis Duffy, recovered in health, took over the working and management of the said three farms, and possessed himself of all the assets of the said James Duffy, and continued to work and manage the said farms until his death on the 2nd October, 1903. On the 21st March, 1899, Francis Duffy obtained letters of administration to his father, James Duffy; and in the schedule the farms were returned as assets of James Duffy.

In the year 1900 Francis Duffy allowed the annuities payable to the Irish Land Commission to fall into arrear, whereupon the said lands were sold by the Irish Land Commission to pay the arrears of the said annuities, and were purchased by the said Francis Duffy on the following dates:—

By conveyance, dated the 12th April, 1900, in consideration of a sum of £15, the lands of Dunanny were conveyed by the Irish Land Commission to the said Francis Duffy in fee-simple, subject to the said annuity. By conveyance, dated the 14th February, 1901, in consideration of a sum of £36, the lands of Cordrummons Upper were conveyed by the Irish Land Commission to the said Francis Duffy in fee, subject to the said annuity. By conveyance, dated the 24th January, 1901, in consideration of a sum of £37, the lands of Blittoge were conveyed to the said Francis Duffy in fee, subject to the said annuity. These conveyances were registered under the Local Registration of Title Act.

The purchase-money so paid by Francis Duffy merely represented the arrears then due in respect of the annuities and costs in connexion with the sales, and did not in any way represent the true value of the farms.

In 1900 Francis Duffy married the defendant, Mary Duffy, but there was not any settlement executed on the occasion of the marriage. On the 8th August, 1901, Francis Duffy made his will, by which he devised the farms of Dunanny and Cordrummons to the defendant. Francis Duffy died on the 2nd October, 1903; and on the 23rd November, 1903, letters of adminis-

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tration, with the will annexed of his estate, were granted to the defendant.

On the 11th December, 1903, letters of administration *de bonis non* of the personal estate of James Duffy were granted to the plaintiff, Thomas Duffy.

The action was brought by Thomas Duffy and Mary Duffy against Mary Duffy (the widow of Francis Duffy) for a declaration that the purchase of the said farms by the said Francis Duffy from the Irish Land Commission was a graft upon the previous interest then existing in respect thereof, and was made by Francis Duffy, as trustee for the next-of-kin of James Duffy; for an account of the rents and profits of the farms received by Francis Duffy, or the defendant; and for an account of the assets of James Duffy come to the hands of Francis Duffy, or the defendant.

The plaintiffs admitted that the purchases of the three farms made by them on the 18th June, 1887, and 9th July, 1887, from the Marquis of Bath were made by them on behalf of the other next-of-kin of James Duffy, as well as on their own behalf, and they were willing to abide whatever order the Court might make in respect of them.

The farm of Blittoge had been sold by Francis Duffy, in 1901, for £500, to James Byrne, who was the registered owner of it under the Local Registration of Title Act, 1891. In the result, the plaintiffs did not claim any relief against James Byrne. The plaintiff, Mary Duffy, died on the 12th December, 1904, after action brought.

By her defence the defendant denied that the farms were sold at sham sales, when they were bought in by Francis Duffy on the 12th April, 1900, 24th January, 1901, and 14th February, 1901; but she averred that the farms were purchased by Francis Duffy at a public auction for valuable consideration, and that Francis Duffy became the registered owner thereof under the Local Registration of Title Act, 1891, freed and discharged from all equities affecting the same. The defendant denied that these purchases were a graft on the prior interest, or that they made Francis Duffy a trustee for the next-of-kin.

The defendant further denied that the plaintiff, Mary Duffy, had managed the farms from the death of James Duffy down to

1898, but pleaded that they were worked and managed by Francis Duffy from the death of James Duffy to the sale of one of them in 1901, and to his own death in the case of the others; and the defendant pleaded that the farms had long ceased to be assets of James Duffy by virtue of the Statute of Limitations, more than twelve years having elapsed since James Duffy's death.

An agreement had been proposed to terminate the litigation between the parties, but it had fallen through.

Matheson, K.C., and *D. G. Chaytor*, for the plaintiffs.

Healy, K.C., and *A. A. Dickie*, for the defendant.

BARTON, J.:—

July 28.

I have had opportunities, in the intervals in the course of this case, of considering the arguments; and I do not think that any advantage would be gained by postponing judgment. The case on behalf of the defendant, who is widow of the late Francis Duffy, has been very ably and strenuously put forward by Mr. Healy, K.C., and Mr. Dickie. I may summarise their arguments as follows:—They contend that upon the death of old James Duffy, in 1885, his three children became equitable tenants in common of his chattels real, and after twelve years' possession acquired title as legal tenants in common by the Statute of Limitations: *Martin* v. *Kearney* (1); that so far as the chattels real of James Duffy were concerned, the taking out of administration by Francis Duffy in 1899 was inoperative, and the inclusion of them in the schedule of assets did not bind him: *In re M'Clure & Garrett's Contract* (2); that Francis Duffy was, in 1899, in law only one of three legal tenants in common, with no fiduciary or other duty towards his co-tenants in common: *Kennedy* v. *De Trafford* (3); that as such he was entitled to buy his father's and sister's farms at the sale by the Irish Land Commission; that his registered title under the Registration of Title Act is conclusive; and that his devisee's title cannot now be impeached.

This ingenious argument disregards, in my opinion, the true facts of the case; and if I were to accede to it, I should be doing a serious injustice under forms of law.

(1) 36 I. L. T. R. 117. (2) [1899] 1 I. R. 225. (3) [1897] A. C. 180.

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The facts are peculiar, and are unlike the facts of any of the cases which have been cited. Old James Duffy died in 1885, leaving three children, Thomas, Francis, and Mary, and leaving three farms. At the time of his death Thomas was in a lunatic asylum, but came out eight months afterwards for about two years. He had to return to the lunatic asylum twice for separate periods during the next few years. Francis was in bad health and unable to do any work for a number of years before and after the father's death. For about fourteen years after the father's death Mary managed the farms, assisted by Thomas during the latter's lucid intervals. It does not seem correct to say that the brothers and sister were in possession as equitable tenants in common for twelve years after the father's death. That can hardly be said to have been the character or quality of their possession. Two years after the father's death, in 1887, Lord Bath's estate was sold to the tenants, and two of these farms were conveyed to Thomas, who was then enjoying a lucid interval, and one to Mary. Francis was not made a grantee, being in very bad health at the time. But Mary and Thomas always acknowledged themselves to be trustees for each other and Francis, who were the three persons entitled as next-of-kin of old James. Before the expiration of twelve years from the date of these conveyances Mary became bedridden, and Francis recovered his health. Thomas had been, for the third time, in the asylum. Soon after Thomas came out of the asylum, Francis, being then the only member of the family sound in mind and body, took out administration to his father. He included these farms in the schedule of assets, and, with the consent of the others, went into exclusive control and management as administrator. He was the only person to buy and sell stock; he was taking the profits. Mary could not pay the rent or prevent it getting into arrears, being a bedridden cripple. Thomas, the recently released lunatic, had no means at that time of paying the rent, as Francis was in sole control, buying and selling and taking profits. Under these circumstances Francis allowed a year's rent to fall into arrear, as a consequence of which the usual proceedings were taken by the Land Commission, culminating in a sale by auction. There was no change of possession. The cattle were removed to a neighbour's land. The neighbours believed that the

whole transaction was part of some family arrangement. To use the graphic phrase of a witness, "it was themselves that was in it." Under these circumstances nobody was likely to bid against "the family" at the sales. Francis went to the auction and bought the three farms for one year's rent, amounting to £15, £36, and £37, in all, £88. As administrator he had valued the farms in his schedule at £108, £256, and £468, in all, £832. Here was a purchase by a person holding the character of administrator, in sole control and management as such, at a gross under-value at a sale which was brought about by his procurement. The whole transaction was behind the back of Thomas, who was not fit or able to protect himself. Francis himself boasted that he "would auction the stool from under Thomas." Can such a transaction stand? Surely not.

It is right to say that in his lifetime Francis never set up the case which is now made for his widow. He never threw any doubt upon his title to the chattels real as administrator; but he evidently thought, as many others have thought before him, that an administrator could buy trust property, and get a registered title to himself. He never dreamt of the ingenious defence which is now set up, founded upon what seems to me to be a misapplication of cases like *M'Clure & Garrett's Contract* (1) and *Kennedy* v. *De Trafford* (2).

Turning to the law of the case, I understand that it is admitted that the plaintiff is entitled to a decree for administration as regards the personal chattels. Then, as regards the chattels real, Mr. Matheson has argued that the Statute of Limitations ran in this case from the conveyance in 1887 to Thomas and Mary, and that Francis, as one of the next-of-kin of old James, had twelve years from that time to assert his claims against his constructive trustees; and that he was rightly advised to do so by taking out administration in 1899 before the twelve years expired.

I do not find it necessary to decide that question definitely. I am content to put this dilemma. At the date of the purchase by Francis of these farms, either they were assets, or they were not. If they were, he was, as administrator, in a fiduciary position, and

(1) [1899] 1 I. R. 225. (2) [1897] A. C. 180.

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could not buy them for himself. If, on the other hand, his title to these farms as administrator could have been disputed on the ground that they had ceased to be assets, that will not avail him. He held himself out as administrator. He clothed himself with letters of administration claiming to have title to the farms. His brother and sister acquiesced in that. He took sole control and management, not as mere tenant in common, as in *Kennedy* v. *De Trafford* (1), but as administrator. He availed himself of his opportunities and authority as such manager to allow rent to fall into arrear, thereby necessitating proceedings by the Land Commission and a sale; and then, behind the back of the weak-minded brother and crippled sister, he bought the farms at a gross undervalue. This Court will treat him as a trustee under such circumstances. His devisee cannot set up any infirmity in his title as trustee as an answer to this claim. What the Court looks to in such a case is the breach of confidence, and the abuse of the relation between the parties. This man held himself out and assumed the position of trustee for his half-witted brother, and this Court will not allow him to capture his brother's property by abuse of the position which he assumed.

I shall declare the purchase by Francis to have been in trust for Thomas to the extent of one-third, and I shall also decree administration. Mary has died since this action was started, and is not represented here. I am not asked to say anything about her. The plaintiff further simplifies the case by asking no relief in regard to Blittoge.

I attach no importance to the documents signed by the plaintiff pending these proceedings. No evidence has been called to support them. They were signatures obtained from a weak-minded old man behind the back of his solicitor, by persons who got him to go to the place of meeting by false pretences, and then got him to sign documents by telling him that what he was signing would do him no harm.

J. MAC M.

(1) [1897] A. C. 180.

The defendant appealed (1).

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Dec. 6, 7.

A. A. Dickie (with him *Healy, K.C.*), for the appellant:—

Next-of-kin who remain in possession after the death intestate of an owner of a chattel real for the period prescribed by the Statute of Limitations acquire legal estates as tenants in common: *Martin* v. *Kearney* (2). In this case Thomas, Mary, and Francis Duffy managed the farms from the death of James Duffy, their father, and acquired a title under the Statute of Limitations against the lands. These farms cannot now be treated as assets of James Duffy, even though they were included in the schedule of assets verified for the purpose of obtaining letters of administration: *M'Glynn* v. *M'Glynn* (3); *Re M'Clure and Garrett's Contract* (4). Therefore, the title of Francis Duffy under the statute was complete, unless it could be shown that he entered into possession as bailiff for the other next-of-kin, as in *Hobbs* v. *Wade* (5); but the evidence does not bear this out. There is no fiduciary relation between tenants in common of real estate or chattels real, as such: *Kennedy* v. *De Trafford* (6); *M'Cormack* v. *Courtney* (7). The purchase of the farms by Francis Duffy in 1901 was not a sham transaction; the farms were sold by public auction, after the sale duly advertised. The only case apparently against our contention is *Burnside* v. *Burnside* (8). But when the original papers in this case are examined, it will be found quite distinguishable.

Matheson, K.C., and *D. G. Chaytor* addressed the Court only on the form of the order.

Healy, K.C., in reply, relied on the agreements only (see p. 216).

FITZGIBBON, L.J.:— Dec. 7.

The dealings with the assets of James Duffy are very complicated. Without going unnecessarily into details, the facts are as

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L. JJ.
(2) 36 I. L. T. R. 117.
(3) 35 I. L. T. R. 132.
(4) [1899] 1 I. R. 225.
(5) 36 Ch. D. 553.
(6) [1897] A. C. 180.
(7) [1895] 2 I. R. 97.
(8) See *infra*, note, p. 218.

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follows:—James Duffy had three farms, and died in 1885, leaving three children: Francis, who has recently died, and Thomas and Mary, both of whom were living at the commencement of the action, but the latter has since died. Thomas got hold of two farms, and Mary of the third, taking conveyances under the Purchase Acts in their own names, ousting Francis, who at that time was unable, through illness, to look after his own interests. The subsequent transactions show that Thomas and Mary were then conspiring to defeat the claims of Francis. At a later date, when the disability had changed, Francis managed to get all the farms into his own hands, though the title was still in the names of Thomas and Mary. It is hard to understand how the transaction which then took place was carried out. But the farms, on which several instalments had been paid towards buying the fee, were put up for sale by public auction, and were purchased by one of the family in his own name, not for any real price, but for the bare amount of the instalments then due to the Land Commission. Mary, who was all right then, though she is now imbecile, managed the farms down to a certain date. When they had been knocked down for the instalments, and when Francis had obtained letters of administration to his father, attempts were made to settle the family quarrels over the property, and the negotiations for that purpose are wholly unintelligible except on the basis that the three members of the family throughout treated their claims as next-of-kin as still subsisting, and as having been kept alive by a common possession or occupation, which prevented the right of any one of the three children from being barred in favour of the others.

Mr. Dickie contended that some title was acquired by Francis by length of time. It is impossible to sustain that contention against the finding of fact, which is sustained by ample evidence, that there never was any time at which any one of the next-of-kin was so out of possession as to make the statute run against him. Francis, who was first left out, in so far as he failed to get a conveyance from the Marquis of Bath, took out letters of administration to his father in 1898, and he then swore that all these farms were assets. He subsequently became the manager of the farms; but he neglected his first duty, viz. to keep down the

instalments payable to the Land Commission. I can come to no other conclusion than that he worked a colourable forfeiture, and took advantage of his position to buy at the auction. Such a transaction could not free the farms from equities in favour of his brother and sister—in other words, the purchases were a graft; and the interests purchased by Francis Duffy remained assets of his father. He sold one farm to Byrne, and he appears to have had some idea that he had acquired a beneficial title for himself; though how he could have so imagined, I fail to understand, as he had notice all through of the present claims. All the people beneficially entitled to the assets are now before the Court, and they have elected to take the purchase-money payable upon the conveyance to Byrne in lieu of the farm that was sold. That being so, while declaring the other lands to be assets of James Duffy, we can declare, as Barton, J., has declared, that Byrne's purchase-money is also assets in the hands of whoever received it, and we will direct a specific inquiry to ascertain who received it, and to whom it now belongs.

In so far as the order under appeal limits the administration, it is erroneous. There must be a general administration account of all the assets. Having regard to the circumstances of the parties, a general inquiry and account of past rents and profits would involve large and unproductive costs, and should, if possible, be avoided. The decree "that the defendant do pay to the surviving plaintiff, Thomas Duffy, his costs incurred in this action" is not consonant with justice. The strictly just rule as to costs would be to declare that the defendant should pay so much of the costs of the action as were caused by the claim put forward by her, as personal representative of her husband, to be the beneficial owner of the farms. But it seems so probable that the attempt by Francis Duffy to get possession of the farms under the letters of administration was only a counter-move against the previous attempt of the plaintiffs to oust him from the conveyances by the landlord, that we will order the costs of both parties to be paid out of the assets, so as to throw those costs upon them in proportion to their respective shares. It is quite clear that the present defendant not only was not a party to the fraudulent dealings of the Duffys, but has been the victim of them.

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WALKER, L.J.:—

I concur. So far as the points put forward by Mr. Dickie are concerned, there is no substance in them. All the parties lived together, and it is perfectly plain that they all had equal rights as next-of-kin until 1899. Then Francis Duffy, thinking that he was badly treated by the others, and that he had been left out in the cold, resolved to assert his rights. Accordingly, in March, 1899, he took out letters of administration to his father, and in the schedule of assets he returned the farms as assets of his father, and further represented that the purchases from the Land Commission were really for the benefit of the assets. I cannot see how he can rely on a tenancy in common, or anything of the kind. His own purchases of the farms in 1900 and 1901 were part of the same game, and the interest which he so acquired was a graft on the former interest.

Mr. Healy abandoned the legal points put forward by Mr. Dickie, and relied upon the agreements. Those agreements were not put forward in any pleading, and it does not appear that they were ever carried out; but they all proceeded on the basis that these farms were assets.

As regards Blittoge, it was sold by Francis Duffy to Byrne, and the plaintiff admits that he does not now claim any relief as to that farm, except in respect to the purchase-money.

HOLMES, L.J.:—

The Duffy family was very sickly; it was also rather fraudulent, and the illness from which its members suffered in turn gave the convalescents opportunities to try to over-reach the invalids.

When James Duffy died, in 1885, his next-of-kin were his three children, who continued to live together on his farms as they had done in his lifetime. These children were the surviving plaintiff in this suit—his sister originally a plaintiff, but now dead, and Francis Duffy, the husband of the defendant. The last-named was in bad health for some years after his father's death; and while he was unable to attend to business, his brother and sister purchased, in their own names, the farms under the provisions of

the Land Purchase (Ireland) Acts. When Francis Duffy recovered, he found that the other two asserted title to all the lands, so as to exclude him from any interest therein. Thereupon, he took out letters of administration to his father, treating the farms as part of the assets, and issued a summons in the Chancery Division to administer the estate. His brother and sister, who were then in bad health, acquiesced in this view; and an arrangement seems to have been come to on this basis; but it was not carried out. Francis Duffy, who was then the only one able to attend to business, allowed the annuities payable under the Land Purchase Acts to fall into arrear, and bought the farms himself, when they were sold by the Land Commission, the price being the precise sum due to that Department. This was, I fear, a device to make himself the owner, as he could have as easily paid the arrears before the sale as at the auction. His widow and personal representative, the defendant in this suit, now asserts her absolute right to the farms, alleging that her husband did not take the lands as personal representative to his father, inasmuch as, previous to his becoming administrator, his brother, his sister, and himself had acquired title thereto as tenants in common. This is the point argued on the appeal, and its relevancy arises from the admitted proposition that while one tenant in common can buy the whole estate for his own benefit, an administrator can only buy for the benefit of the persons interested in the assets. I have no doubt that Francis Duffy must be held to have bought as administrator. He represented the lands as part of the assets, and dealt with his brother and sister on this basis; and he was not at liberty afterwards to reprobate the position he thus assumed. He sold one of the farms, and if the plaintiff had not been willing to treat this sale as valid, it would have been necessary to make the purchaser a party to the suit, but the plaintiff by his consent has got rid of this difficulty.

Solicitor for the plaintiff: *R. E. Bailie.*
Solicitor for the defendant: *A. N. Sheridan.*

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BURNSIDE *v.* BURNSIDE.

Court of Appeal.—8th February, 1895.

Before WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

Case stated by Johnson, J., at the Summer Assizes, 1894.

Equity civil bill brought by William Burnside, administrator with the will annexed of Adam Burnside, against Isabella Burnside, widow, mother of the plaintiff.

1. Adam Burnside died on the 27th March, 1858, possessed of a farm of 20 acres, and leaving a widow and six children (plaintiff and five daughters) all minors.

2. By his will, dated 17th March, 1858, testator bequeathed his farm, cattle, furniture, farming utensils, to his son (the plaintiff), and "out of the above," £5 to his wife, who, if she married again, was to quit the farm, "on demand"; but till then testator desired that she should live with her children. Legacies of £15 to each of his daughters, to be paid to them by William Burnside on their attaining twenty years, respectively.

3. This will was witnessed by two cousins (father and son) of testator, the elder being appointed sole executor. He took the will to his house (six miles away), and told no one of its existence or contents.

4. Soon after her husband's death the widow procured her name to be entered on the landlord's books as tenant.

5. She lived on and managed the farm, maintained herself and her children, and paid various fortunes to each of the daughters upon their respective marriages. She also paid all her husband's debts, &c., and the rent, taking receipts in her own name.

6. Her son (the plaintiff) assisted her more and more as he grew up; but, on his attaining twenty-one, in 1869, no notice was taken of that fact, and the management continued jointly as before.

7. In 1883 William Burnside (the plaintiff) wished to get married, and asked his mother to change the tenancy into his name on the landlord's books. A dispute thereupon arose.

8. The sole executor then produced the will of Adam Burnside, of the existence of which all the next-of-kin were till then ignorant.

9. The plaintiff then insisted on his right to be owner and tenant of the farm.

10. In October, 1884, the executor deposited the will in the District Registry Office, but did not prove it.

11. On June 9th, 1892, probate was granted to plaintiff, as administrator with the will annexed.

12. In January, 1892, Isabella Burnside agreed to purchase the farm under the Land Purchase Acts.

13. On April 7th, 1892, an order was made by Mr. Commissioner O'Brien, that the purchase should be completed.

14. An appeal from said order by William Burnside (the plaintiff) was dismissed by the Land Commission (Bewley, J., and others), the Court expressing no opinion on the question of ownership of the farm.

15. By order of July 26th, 1893, the farm was vested in Isabella Burnside, subject to annual payments, and subject "to any rights or equities arising from the interest vested in the purchaser being deemed to be a graft on her previous interest in the land, or arising in any manner from the existence of such previous interest."

16. From that date Isabella Burnside paid the annual instalments.

17. Civil bill, brought in June, 1892, adjourned from time to time, and finally heard October, 1893, and dismissed.

JOHNSON, J., was of opinion that—

1. Defendant's title was to be referred to her lawful right to live on the farm, and not to an adverse title: *Doe* d. *Milner* v. *Brightwen* (10 East, 583).

2. That, in having her name entered as tenant, she must be held to have acted on her minor son's behalf, or as his bailiff: Simpson on Infants, pp. 112, 113; *Quinton* v. *Frith* (I. R. 2 Eq. 396, 494); *Thomas* v. *Thomas* (2 K. & J. 84); *Wall* v. *Stanwick* (34 Ch. D. 763).

3. That nothing occurred before plaintiff came of age to change the character of defendant's possession: *vide* last two cases cited.

4. That the estate purchased under the Land Act was a graft on the yearly tenancy bequeathed by Adam Burnside.

5. The plaintiff was not barred or disentitled by laches.

His Lordship made an order, declaring the estate vested in the defendant by the vesting order of July, 1893, to be a graft on the tenancy from year to year bequeathed by the testator's will, and that the plaintiff should convey the lands so vested in her to the plaintiff, as administrator with the will annexed.

The questions for the Court of Appeal were—Is the plaintiff's right to the relief prayed for in this suit, as administrator with the will annexed of Adam Burnside—(1) barred by the Statute of Limitations? (2) lost by laches?

THE COURT OF APPEAL answered both questions in the negative.

Ross, J.
1905.
Nov. 28.

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1906.
Jan. 30.
Feb. 15.

IN RE LAMBERT'S ESTATE.

Power—Execution—Joint power of appointment given to father and son—Contingent sole power of appointment given to son, if surviving—Covenant by son, in deed of arrangement with creditors, to exercise sole power—Equitable obligation—Covenant by creditors to forbear suing—Arrears of interest—Right to receive—Statute of Limitations—3 & 4 Wm. 4, c. 27, ss. 40–42.

By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as A and B, subject to the life estate therein of A, during their joint lives, should by deed appoint; and in default of such appointment, to such uses as B, if he should survive A, should, after the death of A, by any deed made after the decease of A, appoint; and in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which B took an estate tail.

In 1868 B, who was then in pecuniary difficulties, executed a deed by way of arrangement with his creditors. This deed provided, as alternative securities, (1) a policy of insurance for £2500, effected on B's life, payable in the event of his predeceasing A, which B assigned to trustees for the benefit of his creditors; (2) a covenant by B, that, if he survived A, and thereby became entitled to the lands, he would, within one month thereafter, grant and appoint the lands by way of mortgage to the use of the trustees, subject to redemption on payment of £2010, the aggregate amount of the debts, with interest thereon at the rate of 5 per cent. This deed contained a grant by the creditors to B of full liberty to follow and attend to his business without any arrest, attachment, or execution against his person or estate by the creditors on account of any of their debts, the debt of any creditor acting contrary to such license to be forfeited and void.

By deeds, executed in 1872 and 1880, A and B, in exercise of their joint power, mortgaged the lands, which latter mortgages were, by an order of the Court of Appeal ([1901] 1 I. R. 261), declared to be puisne to the deed of 1868.

A died on the 8th April, 1899, prior to which a petition for sale was presented by the mortgagees under the deed of 1872, and the order for sale was made absolute on the 3rd September, 1889:—

Held, by the Court of Appeal (reversing the decision of Ross, J.), that the trustees under the deed of 1868 were, on the 8th April, 1899, entitled to payment of the principal sum secured by the said deed, with interest thereon at the rate of 5 per cent. from the date of the deed of 1868, and were not precluded by the Statute of Limitations from claiming more that six years' interest prior to the date of the absolute order for sale.

THE facts of this case, and the contents of the several deeds in question, have been already stated in *In re Lambert's Estate* (1). The case now came before the Hon. Mr. Justice Ross for the ascertainment of the date from which interest was to be deemed to run on the principal sum of £2010 12*s.* 1*d.* secured by the deed of 4th July, 1868. The trustees under the said deed claimed payment of the said principal sum of £2010 12*s.* 1*d.*, together with £3018 3*s.* 10*d.*, being interest at 5 per cent. on said principal sum, less income tax, from the 4th July, 1868, to 4th April, 1899, together with further interest till payment.

Serjeant Dodd, Ronan, K.C., and *R. F. Doyle*, for the trustees.

S. L. Brown, K.C., and *Dixon*, for the petitioners.

H. Wilson, K.C., for other mortgagees.

Ross, J. :—

I am now required to decide a point reserved in an order of 24th July, 1900.

The facts of the case are fully set out in [1901] 1 I. R. 12. The Court must now ascertain the date from which interest is to run on the charge of £2010 set out at No. 6 in the order.

By a deed, dated 31st October, 1862, John Walter Lambert and his son, Thomas Walter Lambert, disentailed the estate and resettled it, limiting it, without prejudice to the father's life estate, to such uses as would be effected by the exercise of a joint power of appointment in the father and the son, and, in default of such joint appointment, to such uses as the son, in case he should survive his father, should, by deed made after the death of his father, direct or appoint. Thomas Walter Lambert, the son, being in embarrassed circumstances, executed a deed, dated 4th July, 1868, in favour of his creditors. The deed recites that Thomas W. Lambert is indebted in the sum of £2010 to the creditors mentioned in the schedule; that he was unable to discharge his debt, and had proposed to his creditors to effect a policy on his life for £2500, and to assign it to the trustees mentioned in the deed, so that in the event of the death of the son in the lifetime of the father, the

(1) [1901] 1 I. R. 12, 261.

Ross, J. 1905. *In re* LAMBERT'S ESTATE.

proceeds of the policy would be available for the discharge of the said liabilities, and, further, that he would enter into a covenant with the trustees to the effect that in case he should survive his father and should come into possession of the lands, he would, within a month thereafter, charge the lands with a sum of £2010 with interest at 5 per cent. from the date of the deed. The operative part of the deed contained a covenant by Thomas Walter Lambert that in case he should survive his father he would appoint the lands to the use of the trustees within a month after coming into possession, subject to redemption on payment of the aggregate debt and interest.

Subsequently, the father and son executed their joint power of appointment several times in favour of other parties.

The Court of Appeal (1) has held that the deed of 1868 took priority over the deeds executed by the father and the son under their joint power of appointment; that the covenant from the moment of its execution affected and bound in equity every estate and interest vested or contingent the covenantor then had or might thereafter have in the lands. They held that it was an equitable alienation operating *in præsenti* upon every estate and interest of the grantor.

The petition in this matter was filed in the lifetime of John Walter Lambert, the father. The absolute order was made in the year 1889. On the 8th April, 1899, John Walter Lambert died, and the proceedings were carried on in the name of Thomas Walter Lambert as owner. The contention of the parties claiming under the deed of 1868 is that inasmuch as the covenant was to charge the estate within a month after the father's death, and by a deed made after his death, they could do nothing until that event occurred, and that consequently their equitable charge was unaffected by the Statute of Limitations.

All this might seem very plausible, indeed, if the decision of this Court had been well founded to the effect that there was no real charge upon the lands till the life estate came to an end. But the reasoning of the Court of Appeal, by which I take leave to say I am quite convinced, puts an end to this contention.

(1) [1901] 1 I. R. 261.

There was an equitable charge operating *in præsenti* as soon as the deed was executed. The interest chargeable on the land became immediately affected by the statute. There were many things the trustees of the deed could have done. They might have proceeded to sell the contingent estate—they might have got a declaration that their interest was well charged thereon. It is a common thing to mortgage a contingency, or often a mere possibility, and in such a case it is well settled the mortgage may be realised before the contingency happens: *Sinclair* v. *Jackson* (1).

The next point that arises is whether the 42nd section of 3 & 4 Wm. 4, c. 27, prevents the recovery of more than six years' arrears accruing due before the reversion falls into possession. In this case the incumbrance was only on the contingent reversion, and not on the life estate at all. The weight of authority is in favour of holding that such a case is not within the exception to the Act. Even supposing the possession to have been vacant, the incumbrancer could not have gone against the life estate. He was not kept out by a prior incumbrancer only, and that is the case dealt with by the proviso. As the incumbrancer is not saved by the proviso, the express words of the Act apply, and limit the interest to six years' interest accrued before the suit was brought. When the order was made absolute on the 3rd of September, 1889, it enured for the benefit of all parties interested in the estate. They are deemed to be plaintiffs in the suit on proceeding.

I, therefore, declare the claimants entitled to six years' interest on £2010 12*s.* 1*d.* at 5 per cent. prior to that date, and to interest at the same rate since.

The other point raised by the notice of motion was given up during the argument.

All parties are entitled to their costs with their respective demands.

R. G. L. L.

(1) 17 Beav. 405.

Appeal. 1906. *In re* LAMBERT'S ESTATE. Jan. 30. Feb. 15.

The trustees under the deed of 1868 appealed against so much of the order of the Hon. Mr. Justice Ross of 28th November, 1905, as declared the applicants entitled to only six years' interest on the sum of £2010 12*s.* 1*d.* at the rate of five per cent. prior to the 3rd September, 1899, and to interest at the same rate since the said date (1).

Serjeant Dodd, Ronan, K.C., and *R. F. Doyle*, for the appellants:—

We contend that once the estate came into the possession of Thomas Walter Lambert the sum to which the appellants were entitled under the deed of 1868 should have been ascertained by taking the principal sum secured by the deed and adding thereto interest at 5 per cent. from the date of the deed. The Statute of Limitations has no application to this case. This Court has decided that the deed of 1868 created a valid, equitable charge upon the lands; but it does not follow that the sum of money secured by it became payable at once. The contract was one of forbearance; all the debtor's property was tied up until (1) the policy fell in—an event which never happened; or (2) John Walter Henry Lambert died. The creditors could not have proceeded to sell the estate before the reversion fell in, because prior to that nothing was due. *Sinclair* v. *Jackson* (2) has, therefore, no application. There was, prior to the death of John Walter Henry Lambert, no "present right to receive" the principal or interest. The Statute of Limitations is a penalty for not proceeding, and has never been held to apply where the creditor could not proceed. It has no application to future obligations. Here the creditors had entered into a contract of forbearance, and covenanted with Thomas Walter Lambert to grant him freedom from arrest, attachment, or execution against his person or estate, on pain of forfeiture of their debts. In *Hornsey Local Board* v. *Monarch Investment Building Society* (3) Lindley, L.J., referring to sect. 8 of 37 & 38 Vict. c. 57, says,

(1) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

(2) 17 Beav. 405.

(3) 24 Q. B. D. 1.

"When one looks a little more closely at the 8th section, I think it will be seen very clearly what is meant by it. The section is dealing with charges on land, and it must be borne in mind that such charges are present charges and future charges, reversionary charges, charges in remainder, and such like. One general form of expression is used to include the whole, and that expression is 'present right to receive.' It seems to me clear that the meaning is, that in each case the moment to be looked to is the moment when the charge comes into present operation; for instance, when reversionary charges are being dealt with, the moment to be looked to is the moment when the reversion falls in, and the charge takes effect in possession." See also *In re Pardoe*; *M'Laughlin* v. *Penny* (1); where Kekewich, J., says that sect. 13 of 23 & 24 Vict. c. 38 contemplates that the person to give the receipt for the share must not only be "capable of giving a discharge for or release of the same," but must also be a person to whom "a present right to receive the same shall have accrued." "That meant," he says, "a right to recover by legal proceedings. In other words, the person to give the receipt must also be able to maintain legal proceedings in order to establish the right."

In a word, the deed of 1868 was a bargain, under which the creditors were to give time and to get interest. If any part of the interest was barred by the Statute of Limitations, the principal must have been barred also, as the creditors had as much or as little right to sue for the principal as for the interest.

S. L. Brown, K.C., and *G. Y. Dixon*, for the respondents:—

The deed of 1868 was in effect an agreement to execute a mortgage, which made the interest payable on the principal sum a charge on the lands from the date of the deed itself, although it was not payable until the reversion fell in. The interest being a present charge on the lands, although it could not be sued for, is within the Statute of Limitations. This Court has already held that the deed of 1868 was an equitable alienation operating *in præsenti* upon every estate and interest which Thomas Walter

(1) W. N., 1905, p. 178; [1906] 1 Ch. 265.

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Lambert had in the lands: *Lambert's Estate* (1). The principle laid down in *Vincent* v. *Going* (2) therefore applies, where it was held that a judgment creditor of a tenant in fee, in remainder after an estate for life, is not entitled to recover out of the lands the arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit. It has never been disputed that a judgment is within the meaning of section 42 of 3 & 4 Wm. 4, c. 27; therefore the limit placed by that section on the amount of interest a creditor is entitled to recover is not based on any equity to sue. The test is whether the creditors had a right to receive the interest, not whether they had a right to sue for its recovery.

[FITZ GIBBON, L.J.: The deed suspends their right to receive.]

The deed suspends the right to sue, not the right to receive. A present right to receive does not mean a present right to sue, but a present right to take. The creditors could at any interval of time between the date of the deed and the death of John W. H. Lambert have given a good discharge for the principal and interest.

The principle of *Vincent* v. *Going* (2) was applied to the case of a legal mortgage of a reversionary interest in *Sinclair* v. *Jackson* (3), approved of by Hall, V.-C., in *Smith* v. *Hill* (4). The position of the trustees under the deed of 1868 was analogous to that of the executors in *Waddell* v. *Harshaw* (5), where it was held that in an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death: *Hornsey Local Board* v. *Monarch Investment Building Society* (6).

If more than six years' arrears of interest be recoverable, the deed of 1868 contravenes the policy of the law. It was in effect a mortgage, and if the covenant amounts to an agreement that more than six years' interest shall be payable and recoverable, notwithstanding section 42, it is illegal. That which cannot by law be done directly cannot be effected by a contrivance: *Booth* v.

(1) [1901] 1 I. R. 261.
(2) 1 J. & Lat. 697, 701.
(3) 17 Beav. 405.
(4) 9 Ch. D. 143.
(5) [1905] 1 I. R. 416.
(6) 24 Q. B. D. 1.

Bank of England (1). The result contended for would interfere with the rights of puisne incumbrancers, some of whom would lose their securities entirely. An acknowledgment by the mortgagor that more than six years' interest was due, would not preclude the puisne incumbrancers from relying on the Statute of Limitations: *Bolding* v. *Lane* (2).

Ronan, K.C., in reply.

WALKER, C.:—

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The question in this case arises in respect of transactions and deeds which this Court had to consider in another branch of *Lambert's Estate*, the decision on which is fully reported in [1901] 1 I. R.

It appears that the lands of Aggard, with others, were, at the date of a disentailing deed, dated 31st October, 1862, limited to John Walter Henry Lambert for life, with remainder to his eldest son, Thomas Walter Lambert, in tail male; and, by the disentailing deed, Thomas Walter Lambert, with the consent of his father, as protector of the settlement, granted the lands to a trustee to hold, subject to the life estate of the father, to such uses as the father and son should jointly appoint; and in default of such appointment to such uses as the son, in case he survived his father, should by deed, made after the decease of his father, appoint; and in default of such appointment, to the subsisting uses of the settlement.

It further appears that in the year 1868 Thomas Walter Lambert had got into financial difficulties, and his debts amounted in the aggregate to £2010 12*s.* 1*d.*; and on the 4th July, 1868, he executed a deed for the purpose of securing this sum, the scheme of which was to provide a fund to pay them, in case he died in the lifetime of his father, by a policy of insurance, and, if and when he survived his father, by a charge upon the land.

The object of the deed is clearly stated in the recital:—"And whereas the said Thomas Walter Lambert is indebted to the several parties hereto of the third part, and in the schedule hereunto annexed mentioned, in the several sums of

(1) 7 Cl. & Fin. 509. (2) 1 De G. J. & Sm. 122.

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money set opposite the name of each of such parties, making in the aggregate the sum of £2010 12*s.* 1*d.*, and being unable to discharge the same, he hath proposed to his said creditors to effect a policy of insurance on his life for the sum of £2500, and to assign the same to the parties hereto of the second part, as trustees for themselves and the several parties hereto of the third part, so that, in the event of the death of the said Thomas Walter Lambert in the lifetime of the said John Walter Henry Lambert, the proceeds of the said policy of insurance would be available for the payment and discharge of his said liabilities, together with interest thereon respectively at the rate of 5 per cent. per annum, so far as the same might extend to the payment of such interest. And, further, that he, the said Thomas Walter Lambert, would enter into a covenant with the said parties hereto of the second part, as such trustees as aforesaid, to the effect that in case he should survive the said John Walter Henry Lambert, and should come into possession of the lands, premises, and hereditaments in the said recited settlement of the 1st day of February, 1833, and the said will of the said Walter Lambert, and hereinafter respectively mentioned, and into receipt of the rents and profits thereof, he would, within one month thereafter, charge the same lands, premises, and hereditaments, with the said sum of £2010 12*s.* 1*d.*, being the aggregate amount of the debts so due and owing to the parties hereto of the third part, together with interest on said several sums respectively at the rate of 5 per cent. per annum, to be computed from the day of the date hereof, to which the said several parties of the third part have respectively agreed upon having the payment of the sum of £32 10*s.* per annum, the amount of the annual premium payable in said policy of insurance so to be effected as aforesaid, secured in manner hereinafter mentioned." It is thus made part of the contract of forbearance and consideration that the creditors represented by the £2010 12*s.* 1*d.* should get interest on their debts at 5 per cent. per annum from the 4th July, 1868. Trusts are then declared of a policy for £2500, including trusts to secure the premiums thereon, and the deed then subsequently contains a witnessing part in respect of the land by which Thomas W. Lambert covenants with the trustees in the following terms:—

"That in case he, the said Thomas Walter Lambert, shall survive the said John Walter Henry Lambert, and become thereby entitled to and enter into possession of the lands . . . and the receipt of the rents and profits," he will, within one calendar month thereafter, grant and appoint the lands to the use of the trustees, and the survivor of them, their and his executors, administrators, and assigns, "subject to redemption on payment of the said sum of £2010 12*s.* 1*d.* and interest thereon at the rate of 5 per cent. per annum."

By the last witnessing part of the deed the creditors granted licence to Thomas Walter Lambert to attend to his business without arrest or molestation against his person or estate on account of any of their debts; and each of them agreed that if they did so, contrary to the licence given, his debt or debts should be forfeited and void, and the grant and licence thereby given should be and operate as an absolute and final release of every such debt, and might be pleaded in bar to the recovery thereof.

The father and son subsequently, in exercise of their joint powers, granted two mortgages—one dated 20th December, 1872, for a sum of £10,346 13*s.* 4*d.*; and another, dated 25th May, 1880, for £1400. Both of these refer to the contingent charge of £2010 12*s.* 1*d.*, as one to which the lands will be subject. A question arose as to the priority of the deed of 4th July, 1868, as regards those latter deeds, which came before this Court, which by its order of 26th February, 1901, discharging an order of Judge Ross, declared that the deed of 4th July, 1868, should have priority according to its date over the deeds executed under the joint power.

The mortgagees of 1872 presented a petition for sale of the lands in the lifetime of the father, on which an absolute order for sale was made on the 3rd September, 1889.

The father died on the 8th April, 1899. The moneys secured by the policy, therefore, never became payable; and it was not till 1899 that the charge, created by the deed of 4th July, 1868, became actually operative. Till then it rested on contingency. The question which recently came before Judge Ross, and which is the subject of the present appeal, is the amount of interest recoverable out of the lands on foot of the £2010 12*s.* 1*d.*; and his order is that the persons claiming in respect of that charge are

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entitled to six years' interest at the rate of 5 per cent., prior to the 3rd September, 1889, the date of the absolute order for sale, and to interest at the same rate since, subject to any payments appearing to have been made.

The Receiver has paid the interest on the principal sum from the 8th April, 1899, to the 8th April, 1905.

The appellants contend that they are entitled to interest at the rate of 5 per cent. from the 4th July, 1868, to the 8th April, 1899, which, with the principal, according to the schedule to the affidavit, amounts to £5028 15*s.* 11*d.* The *ratio decidendi* of Mr. Justice Ross's order is that by the effect of the appeal order—to use his own words —" there was an equitable charge operating *in præsenti* as soon as the deed was executed. The interest chargeable on the lands became immediately affected by the statute. There were many things the trustees of the deed could have done. They might have proceeded to sell the contingent estate—they might have got a declaration that their interest was well charged thereon." He, then, is quite logical in saying the 42nd section, limiting the arrears of interest recoverable out of the lands to six years, applies.

But I do not think the learned Judge has rightly interpreted the effect of the appeal order. As I understand it, what was held was that Thomas Walter Lambert was bound in 1868 to charge the lands according to his contract as contained in the deed of 4th July; and when the 8th April, 1899, came, he was, having regard to the facts, bound to charge £2010 12*s.* 1*d.* and interest thereon from 4th July, 1868; and to that extent an equitable obligation was created against the lands. No interest became due till 8th April, 1899. The terms of the deed are express upon that, especially the last witnessing part which created a forfeiture of the debt if any attempt was made to enforce it. The grantee bargained for immunity on special terms, viz. to have the interest from 4th July, 1868, leviable against the lands, if he survived his father. When did a present right to receive this charge of £2010 12*s.* 1*d.*, first accrue within the meaning of sect. 8 of the Act of 1874? I think on the 8th April, 1899.

The case of *Hornsey Local Board* v. *Monarch Investment Building Society* (1), applied by us in *Waddell* v. *Harshaw* (2),

(1) 24 Q. B. D. 1. (2) [1905] 1 I. R. 416.

contains a reading by Lindley, L.J., on the 8th section which shows this. He says (p. 9)—"The section is dealing with charges on land, and it must be borne in mind that such charges are present charges and future charges, reversionary charges, charges in remainder, and such like. One general form of expression is used to include the whole, and that expression is 'present right to receive.' It seems to me clear," he says, "that in each case the moment to be looked to is the moment when the charge comes into present operation; for instance, when reversionary charges are being dealt with, the moment to be looked to is the moment when the reversion falls in and the charge takes effect in possession." The actual decision in *Earle* v. *Bellingham* (1) is an illustration of the rule. A present mortgage of a reversionary interest is quite a different matter: such as *Sinclair* v. *Jackson* (2); *Vincent* v. *Going* (3). None of the interest on this charge was due till the 8th April, 1899, and then it became due as from 4th July, 1868, with the principal. That principal and interest could then have been recovered out of the lands, and from 3rd September, 1889, no time runs; and payments have been made to 4th April, 1905, from 8th April, 1899, through the receiver; and furthermore the making of the absolute order stopped the running of the statute.

For these reasons I think the order of Judge Ross must be discharged, and the appellants declared to have been entitled to payment on the 8th April, 1899, of the principal sum with interest from the 4th July, 1868, at the rate of £5 per cent. with further interest to the present, after giving credit for all payments made by the receiver.

Appellants' costs with their demand in Court below and here.

FITZ GIBBON, L.J.:—

The decision of the Lord Chancellor appears to me to be, in the mathematical sense, "deducible" from our former decision (4).

The following passages state the opinion which I then held, and they seem to me to rule the present case. [His Lordship read from the words "The first matter to be determined" (p. 267) to

(1) 24 Beav. 448.
(2) 17 Beav. 405.
(3) 1 Jac. & L. 697.
(4) [1901] 1 I. R. 261.

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"act of the covenantor" (p. 268). From "What he is precluded from doing" to "he concurs with another person" (p. 269); and "I can give it no other or less effect" to "in favour of his creditors" (p. 270).]

The special character of the deed of 1868 appears material when we come to apply these principles to the present case.

It was eminently a contract of *forbearance*. The creditors then had a present right, as the deed shows, to harass their debtor for £2010, personally and through his property, by insisting on immediate payment.

They not only gave up this right, but they also bound themselves, for value, to forfeit their demand if they attempted to enforce it.

Therefore the contract, so long as it lasted, imposed on the creditors an absolute disability to enforce their legal claim, and an obligation to forbear until a future event should happen, on the terms of their getting a security realisable at a future time, for the principal with simple interest upon it, to accrue but not to be realisable, in the meantime. The accrual of this interest *de die in diem* was the only consideration which the creditors got for forbearing both the principal and the interest until the security fell in.

The inclusion of the policy of insurance in the security is also material. It ensured that the creditors should not lose their money in the end; but what they were ultimately to get, though deferred, was payment of the capital sum of £2010 with interest from the date of the deed to the date of payment. The date from which the interest was to run was fixed by the deed.

If the Statute of Limitations could operate to cut off the interest from the top as it ran on at the bottom, it seems to me that it must have had the same operation upon the principal also, for there was no payment or acknowledgment of it, while the right of recovery was suspended. Such an effect is not within the mischief at which the Statute of Limitations was aimed. The payment of principal and of interest alike was postponed; and the longer the interest ran, the more the creditors lost, for simple interest deferred is less valuable than interest periodically paid as the price of the forbearance of principal.

I see no answer to Mr. Ronan's argument that, if the Statute of Limitations ran against this interest, it must equally have run against the debt. But that debt was the very liability upon which the interest arose, and it became payable and receivable, and recoverable in fact, as distinguished from being chargeable in conscience only, when the security fell in, and the statute did not begin to run against either principal or interest until that event happened.

Long before that event the estate came under the Court, and the order for sale put an end to the applicability of the Statute of Limitations.

The effect of the deed of 1868 was, in my opinion, the same as if Thomas Walter Lambert had executed a deed in 1899, when his contingent estate in reversion had fallen into possession, charging his then present property with £2010, and interest thereon at 4 per cent. from July 4, 1868, which he could then have done, abstaining from setting up the statute, and fixing by contract the amount of interest which he was to pay. The only difference was that he made this contract at an earlier date, in consideration of the forbearance of the creditors, who have stood out of their money ever since, on the terms that the £2010 should be an interest-bearing fund all the time, though neither principal nor interest could be recovered during the agreed suspension of the right to receive.

Agreeing with the Lord Chancellor, I have added these observations only to show that, so far as my former judgment is concerned, it leads clearly to our present decision.

HOLMES, L.J. :—

It is possible that a want of precision in the language of the members of the Court, on the occasion of the former appeal in this matter, has misled Mr. Justice Ross; for he seems to have misunderstood the grounds of the judgment then given. Under a disentailing deed of the 31st October, 1862, the lands now for sale in the Land Judge's Court were limited, subject to John Lambert's life estate therein, to such uses as he and his son, Thomas Lambert, should, during their joint lives, by deed jointly appoint; and in

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default of such appointment as Thomas Lambert, in case he should survive his father, should by deed, made after the death of the latter, appoint. This being the state of the title, the son got into pecuniary difficulties, and a deed of the 4th July, 1868, was executed for the purpose of arranging with his creditors. By this instrument an alternative security was provided for payment of his debts, one to take effect if Thomas died in the lifetime of his father; the other if he survived him. In the first-mentioned case the debtor could never have exercised the power of appointment, which was only to arise after his father's death, and therefore he effected a policy of assurance for £2500 on his own life, payable in the event of his predeceasing his father, and assigned it to trustees for the creditors. The security given in the other event was a covenant by the son that, if he survived and thereby became entitled, he would within one month thereafter grant and appoint the lands to the use of the trustees, subject to redemption on payment of £2010, the amount of the debts, with interest thereon. After 1868 the father and son, by an exercise of their joint power of appointment, mortgaged the lands; and the father having died in 1899, the subject of controversy in the former appeal was whether these mortgages took priority of the security created by the deed of 1868? We held they did not, but the *ratio decidendi* was not that the effect of the covenant in the deed of 1868 was to place an immediate contingent charge on the lands in favour of the trustees for the creditors. It was, to use my own words, that, upon the happening of the stipulated event—that is, in case the son survived his father—the covenant would be a valid execution of the power of appointment conferred on the former by the disentailing deed. In the meantime it would carry with it an obligation on the part of the covenantor not to derogate from the value of the security by any subsequent voluntary act. If this is correct, the charge on the lands for the principal sum of £2010 with interest arose on the death of John Lambert, in 1899. This gets rid of all objections based on the Statute of Limitations. There cannot be a right in any person to receive a charge until the charge comes into existence. It is to be observed that the order appealed from allows not only the principal sum of £2010, but also interest thereon for six years

prior to the 3rd September, 1889, being the date of the absolute order for sale; but if the lands were charged in July, 1868, and nothing was afterwards paid on account of either principal or interest, not only the right to recover all the interest, but even to recover the principal sum, was barred. No explanation has been given of this apparent inconsistency. I cannot agree with Mr. Justice Ross in holding that the trustees of the deed of 1868 might have proceeded to sell the contingent estate. If my view of the construction of that deed is right, they could not have done so under any circumstances; and, moreover, there is an express provision in the deed that Thomas Lambert should not be molested in his person or estate on account of the debts secured; and that if any creditor attempted so to do, his debt should be forfeited and void. It has been argued rather weakly that the charge of interest is confined to interest from the time when the principal sum itself first became a charge; but the recital in the deed shows clearly that the interest contemplated is to run from the date of its execution.

For these reasons I am of opinion that the appeal must be allowed.

Solicitor for the trustees: *J. Rose Byrne.*
Solicitors for the petitioners: *French & French.*

R. ST. J. C.

Appeal.
1906.

IN RE RUTHVEN'S TRUSTS (1).

Jan. 17, 18. *Trustee Act*, 1903 (56 & 57 *Vict. c.* 61, *section* 26 (6)—*Constructive trustee—Contract to convey real estate—Refusal to execute conveyance—Vesting order.*

A (a Scotch peer) was entitled to the lands of H., in the county of Wexford, in fee-simple; he was also entitled, as first heir of entail by Scotch law, to a sum of £30,000, of which his eldest son B was next heir of entail. This sum of £30,000 represented the balance of the purchase-money of a settled estate in Perthshire, which had just been sold.

By agreement in writing, dated the 30th March, 1892, A agreed with B that, in consideration of B consenting to disentail the £30,000, and agreeing that out of that sum the debts of A, to the extent of £9000, should be paid; that an annuity of £1000 should be secured for the lives of A and his wife and the survivor; that the remainder of a sum necessary to secure portions for younger children should be provided, and that the balance of the fund should be secured for B, A agreed to convey the lands of H. to trustees upon certain trusts, with a power of sale. The terms of the agreement had all been carried out, except the conveyance of the H. estate, which A refused to execute. An action was brought in the Court of Session in Edinburgh, in which a decree was obtained, ordering him to execute the conveyance; but he refused to do so.

On an application under section 26 of the Trustee Act of 1893, for an order vesting the H. estate in the trustees of the agreement:—

Held (reversing the decision of Barton, J.), that A was a trustee within section 26 of the Trustee Act of 1893, and that a vesting order should be made.

IN, and prior to, 1892 Lord Ruthven was seised in fee of the lands of Harperstown, in the county of Wexford, subject to certain charges and incumbrances. He was indebted to a considerable extent, and, amongst other debts, he owed £11,000 to his eldest son, the Master of Ruthven, and £9000 to other creditors; the said Lord Ruthven, having borrowed, with the consent of the Master of Ruthven, various sums of money on the security of a fund of £30,000, being the balance of the purchase-money of an entailed estate of freehold in Perthshire, in Scotland, of which Lord

(1) Before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Ruthven was first heir of entail, and the Master of Ruthven was the next heir of entail. Lord Ruthven asked his son to break the entail, which he agreed to do upon the terms mentioned in the following documents :—

By power of attorney, dated the 16th January, 1892, Lord Ruthven appointed George Auldjo Jamieson, whom failing Charles J. G. Paterson, his attorney, to enter into agreements, and to do everything in the premises to the same effect as he could himself, and to grant, subscribe, enter into, and deliver all writs, deeds, and other documents of every kind necessary or proper for the due execution of any of the powers therein given.

By agreement, dated the 30th March, and the 11th April, 1892 (1) (registered in the books of Council and Session, in Scotland, on the 7th June, 1892), made between the said George Auldjo Jamieson, as attorney of Lord Ruthven, and James Haldane, of the first part, and the Master of Ruthven of the second part, the Master of Ruthven agreed to disentail the £30,000 on the following conditions :—That the Master of Ruthven was to forego payment of the £11,000 ; that a sum of £9000 should be applied in payment of Lord Ruthven's debts; that a sum of £1800 should be set apart, as a balance, to complete a fund to provide portions for younger children ; that an annuity of £1000 a year should be provided for Lord Ruthven and Lady Ruthven, and for the survivor ; that a sum of £6000 should be paid to the Master of Ruthven in certain events therein named, and that the residue of the fund should be paid to the Master of Ruthven. For these considerations Lord Ruthven was to convey the lands of Harperstown, in the county of Wexford, to George Auldjo Jamieson (and failing him by death or resignation, to Charles J. G. Paterson, in his room) and to Archibald R. C. Pitman, as trustees, with extensive powers of management, and also a power of sale.

A declaration of trust was granted by the trustees under the said agreement, with consent and concurrence of Lord and Lady Ruthven, and of the Master of Ruthven, dated the 18th and 24th August, the 15th and 16th September, and the 3rd and 5th October, 1892 (1), whereby the purposes for which the above balance

(1) According to the practice in Scotland, more than one date is given to a deed, according to the dates of its execution by the several parties.

Appeal. 1906.

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of the £30,000 fund, and a certain mortgage for £6989 (being the last mortgage on Harperstown), and the reversion of the Harperstown estate, were held were set forth. These purposes were the same as those stated in the above agreement, and this declaration of trust was signed by Lord Ruthven on the 3rd of October, 1892.

George Auldjo Jamieson died on the 18th July, 1900.

The terms of the agreement had been carried out, except the conveyance of Harperstown; the £9000 had been applied in payment of Lord Ruthven's debts; the annuity for Lord and Lady Ruthven had been secured; the younger children's portion had been provided for; and the balance of the £30,000, and the mortgage for £6989 (being the last mortgage on Harperstown) had been received by the trustees.

The trustees of the agreement having resolved to sell the Harperstown estate to the tenants, through the Irish Land Purchase Acts, and having found it necessary for that purpose to get in the legal estate in Harperstown, which was vested in Lord Ruthven, required him to convey the same to them, which he refused to do. In 1905 the trustees, and the Master of Ruthven, raised a summons in the Court of Session in Edinburgh, against Lord Ruthven, for a decree that Lord Ruthven should be ordered to execute the conveyance, and on the 27th March, 1905, Lord Stormonth Darling, by interlocutor, found that the defender was bound to execute to the trustees a conveyance of Harperstown. On account of a technical mistake in the decree, the pursuers reclaimed to the Inner Division, and on the 26th of May, 1905, the Inner Division recalled the interlocutor, and remitted the cause to the Lord Ordinary to proceed therein and discern, and on the 30th May, 1905, Lord Johnston, the Lord Ordinary, ordered Lord Ruthven to execute and deliver to the trustees a conveyance of Harperstown within fifteen days. An application was made on the 18th July, 1905, to the Court in Scotland for an order, under its general jurisdiction, directing an officer of the Court to execute a conveyance in the name of Lord Ruthven, but Lord Johnston held that there was no jurisdiction to make such order.

Lord Ruthven still refused to execute the conveyance; and as the Trustee Act, 1893, did not apply to Scotland, and the

lands were situate in Ireland, the Master of Ruthven, and the trustees of the agreement, Charles J. G. Paterson and Archibald R. C. Pitman, applied for an order, under section 26 of the Trustee Act, 1893, that the estate of Lord Ruthven in the lands of Harperstown should vest in the trustees on the trusts of the agreement of the 30th March, 1892, and of the declaration of trust made in conformity therewith.

The case came before Barton, J., on the 18th November, 1905, when his Lordship refused the application, and the Master of Ruthven and the trustees appealed.

H. D. Conner, K.C., and *Jefferson*, for the appellants : —

We submit that Lord Ruthven is a trustee within sect. 26 of the Trustee Act of 1893. If the purchase-money of a property has been paid to the vendor in his lifetime, he becomes a trustee of the legal estate : *Re Cuming* (1). Where a contract is executed, the Court will make a vesting order under the Trustee Act of 1850 : *Re Bradley's Settled Estate* (2). Where a decree for specific performance would be made as a matter of course, the Court will make a vesting order : *Re Pagani* (3); *Re Beaufort's Will* (4). *Re Carpenter* (5) and *Re Colling* (6) do not apply, because there was no written contract in those cases ; and whether the heir was bound, was a question which could not be decided without a suit for specific performance.

G. N. Oulton, K.C. (with him *The Right Hon. J. H. Campbell, K.C.*, and *A. C. Meredith*), for Lord Ruthven :—

This case falls within sect. 31 of the Trustee Act, 1893, and not within sect. 26. Sect. 26 only applies to cases of express trusts. Lord Ruthven is not a trustee, and the Court will not make a vesting order unless a decree for specific performance has been pronounced. In cases relating to real estate the vendor, or his representative, cannot be declared a trustee, unless the right to specific performance has been settled by a decree, because there might always be a question whether the contract could be

(1) L. R. 5 Ch. App. 72.
(2) 54 L. T. (N. S.) 43.
(3) [1892] 1 Ch. 236.
(4) W. N., 1898, 148.
(5) Kay, 418.
(6) 32 Ch. D. 333.

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enforced by a suit, and it would be inconvenient to declare the vendor a trustee upon a petition on which that point could not be decided: *Re Carpenter* (1); *Re Colling* (2); *Re Burt* (3); *Re Martin's Trusts* (4); *Re Propert's Purchase* (5). *Re Pagani* (6) does not apply, as it was decided on a section of the Lunacy Act.

Jan. 18.

WALKER, C.:—

We do not require to hear the appellant's counsel in reply, as we have formed a clear opinion that under the circumstances this order could, and ought to, have been made under section 26 of the Trustee Act of 1893.

The agreement of 30th March, 1892, signed under a power of attorney from Lord Ruthven, provided that certain payments should be made out of a sum of £30,000, part of the proceeds of the entailed estate, and that the respondent should execute a conveyance in favour of the trustees of the lands of Harperstown, in the county of Wexford, upon certain declared trusts, including trusts for the benefit of Lord Ruthven himself, and there were clauses in the deed for further assurance. No formal conveyance was executed in pursuance of that agreement, but all the parties acted upon it, and Lord Ruthven received the benefits contemplated for him. On the 18th August, 1892, that agreement was further carried out by a declaration of trust, reciting the agreement which had been previously executed. It was thus ratified in the clearest way by Lord Ruthven, signed by him, and executed by him as a deed on the 3rd October, 1892. That, perhaps, was not sufficient to make him a trustee, but it was sufficient to bring him within section 26. He was asked to convey, and he refused. Then there was a suit in the Scotch Courts, and a decree was obtained in May, 1905. That decree was a very formal one, and under it he was bound to convey the lands to the trustees, but he refused to sign the deed, or to act on it. It further appeared that those documents which he had signed had been acted on. He got consideration for it; debts had been paid; and the income which it was stipulated he should get under the agreement was received by

(1) Kay, 418.
(2) 32 Ch. D. 333.
(3) 9 Ha. 289.
(4) 34 Ch. D. 618.
(5) 22 L. J. Ch. (N. S.) 948.
(6) [1892] 1 Ch. 236.

him so far as the rents were sufficient. After the decree was obtained, the Scotch Judges decided—and, apparently, rightly decided—that a vesting order could not be made in Scotland as regards real property in Ireland. The Trustee Act of 1893 does not apply to Scotland, and, accordingly, they referred the appellant to the Irish Courts.

We are here now with the provisions of the Act of 1893. Section 25 is headed with the words "Part III., Powers of the Court." Then, section 26 says, "In any of the following cases . . . the High Court may make an order vesting the land." Subsect. vi, "Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or to release the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement." "Trustee" there includes by the definition a constructive or implied trustee, and I am prepared, if necessary, to decide that the respondent can be brought within those very words. He is a constructive trustee under the Scotch decree, which binds him as a decree *in personam*, which would be taken against him in any tribunal in which he chose to dispute it. Indeed, it was contended for the respondent that the proper remedy was to attach him for disobedience to the decree, as he would have no answer.

It was then said that section 31 is the section under which alone this case would range. Assuming that he is not a trustee within clause 26, though I think he is, it was contended by Mr. Oulton and Mr. Campbell that where a man has entered into a contract—no matter how clear it is that he is a constructive trustee—you cannot proceed without first getting a decree under section 31, and again traversing all the ground gone over by the Scotch Court and getting a second decree from the Irish Court, it being admitted by counsel in answer to a question put by me, that there would be no defence whatever to such an action. It would be lamentable if that were so. There is plenty for section 31 to operate on. I quite agree that if a defence to an action for specific performance of the agreement here

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could be raised, it would be a different matter. But that was not suggested, and further, under section 31, it would be competent for "the High Court to declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of the Act."

How does the law stand on the authorities? We were referred to *Carpenter's Case* (1) and *Colling's Case* (2). In the first of these cases there was no contract in existence binding the property. It was verbal; and in *Colling's Case* (2) the lunatic had not made any contract before his incapacity. The consideration was not acted on in these cases. The case of *Re Cuming* (3) is on its facts more like the present. There have been several decisions since, which are I think in point: *Pagani's Case* (4), for instance, a decision of the Court of Appeal in England, consisting of Lindley, Bowen, and Fry, L.JJ. Fry, L.J., was one of the Judges who decided *Colling's Case* (2). In the case of Pagani a man agreed to sell his leasehold premises and business to a purchaser for a sum of which £2535 was to be paid at once, and the residue, £3050, at the end of five years. Possession was given, and the £2535, part of the consideration, duly paid. After that the man who entered into the contract was found a lunatic abroad, and a curator was appointed with authority to receive the £3050. The purchaser and the curator petitioned that on payment of the £3050 and interest to the curator, the leaseholds might be ordered to vest in the purchaser under section 135 of the Lunacy Act of 1890, which is the same as section 26. It was argued by Mr. Farwell and Mr. Amedroz. They referred to *Colling's Case* (2), and showed that there no contract had been entered into by the lunatic, and there was no one to receive the balance of the purchase-money; and to *Carpenter's Case* (1), where there was no written contract, and whether the heir was bound could not be decided without a suit for specific performance. They then referred to *In re Lowry's Will* (5). "Where the purchase-money has been paid to a vendor he becomes a trustee: *In re Cuming* (3), the question being, as there stated, whether there is an executed contract, or

(1) Kay, 418.
(2) 32 Ch. D. 333.
(3) L. R. 5 Ch. App. 72.
(4) [1892] 1 Ch. 236.
(5) L. R. 15 Eq. 78.

whether it remains executory?" In giving judgment Lord Lindley said—"We have here a contract for sale entered into by the lunatic before his incapacity, and so acted upon that a decree for specific performance would be a matter of course." That involves that it may be done without a decree for specific performance being actually made, if it would be granted as of course. Here the agreement was acted on; debts were paid; and money was received; the rents being paid to the tenant for life. Lord Lindley went on to say—"As soon as the £3500 and interest are paid to the curator, the lunatic will be a trustee, there being nothing remaining to be done under the contract but to get in the legal estate." That is the same as the present case. That was followed in *Re Beaufort's Will* (1). There the vendor agreed to sell certain copyhold lands and died a few days after, leaving his heir an infant; a deposit only had been paid. The vendor died before the title was accepted, and the customary heir-at-law, by reason of infancy, was unable to surrender. Upon a petition by the executors and trustees of the vendor's estate and the purchaser that the property might be vested in the purchaser on payment of the balance of purchase-money, Kekewich, J., made the order. *Pagani's Case* (2) was followed. Whether, therefore, we take it on the documents and the action under them, which I think are sufficient to constitute the respondent a trustee within sect. 26, or whether we deal with it upon authority, having regard to the fact that Mr. Oulton, when asked, admitted there would be no defence to an action for specific performance, I think the order should be made. It would be idle to go over this whole matter again with a gentleman who will do nothing unless there is another decree against him.

The appeal will therefore be allowed; the order of Barton, J., will be discharged, and an order vesting the property will be made.

The only other question is the question of costs. It has been decided that if a trustee refuses to do what he ought to do, there is jurisdiction to make him pay the costs; and such an order was made in *Re Knox* (3).

(1) W. N., 1898, 148. (2) [1892] 1 Ch. 236. (3) [1895] 1 Ch. 538.

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We shall order the respondent to pay the costs; and in default of his paying them, the trustees are to be at liberty to deduct them out of any funds in their hands coming to the respondent.

FITZ GIBBON, L.J.:—

The first objection to the application was, to a certain extent, technical. It was that, in a case such as this, a decree for specific performance is a condition precedent to a vesting order under the Trustee Act.

I can reconcile *Carpenter's Case* (1) and *Colling's Case* (2) with *Pagani's Case* (3) and the *Beaufort Case* (4) only by holding that the later cases establish that, on an application under the Trustee Act, the Court may consider the question whether there would be any defence to an action for specific performance, and may make a vesting order without requiring a judgment, if satisfied, as Lord Lindley said, "that a decree for specific performance would be a matter of course."

We ought to consider very carefully whether Lord Ruthven could put forward any defence in an action for specific performance, and if so, we should not act summarily under the Trustee Act.

But, in my opinion, upon the three documents in proof—viz. (1) the power of attorney executed by Lord Ruthven; (2) the agreement executed for him under that power; and (3) the declaration of trust executed by himself—we should hold him to be a trustee, unless he shows some reason for doubting that those documents are valid. A trust can never fail for want of a trustee, and any person bound as these three deeds purport to bind Lord Ruthven would, in my judgment, be, in equity, a trustee for the purposes declared by them of any estate held by him in the lands comprised therein.

Still, that should not prevent Lord Ruthven from showing that he ought to be relieved from the trusts, or, at least, that they should not be enforced against him. But we have here, as Lord Lindley had in *Pagani's Case* (3), a contract entered into, and so acted upon that a decree for specific performance would be a matter of course. Lord Ruthven could not be discharged from his contract

(1) Kay, 418.
(2) 32 Ch. D. 333.
(3) [1892] 1 Ch. 236.
(4) W. N., 1898, 148.

except by setting aside the whole transaction. For thirteen years he has been receiving money out of the property in dispute, from the hands of the very men whom these documents constituted express trustees. They have been, and still are, administering the trust property. Lord Ruthven could not rid any legal estate which he has from those trusts, without accounting for all that he has received, and restoring both parties to their original positions. That brings this case within *Pagani's Case* (1) and the *Beaufort Case* (2). In the latter, the contractual vendor had died before the title was accepted—leaving an infant devisee and heir-at-law; and it was ordered that the lands should vest in the purchaser, for all the estate of the infant heir-at-law, and of the testator at the time of his death. In *Pagani's Case* (1), the person who had contracted to sell became *non compos mentis* before conveyance, and "there being nothing remaining to be done under the contract but to get in the legal estate," that estate was vested in the purchaser by an order made under the Lunacy Act, 1890, sect. 135, which is identical in effect with the Trustee Act, sect. 26. In argument, *Carpenter's Case* (3) was distinguished on the ground that there appeared to have been no written contract, and the question whether the heir was bound could not be decided without a suit for specific performance. *Colling's Case* (4) was distinguished because no contract had been entered into by the lunatic. Here Lord Ruthven himself made the contract, and is bound by it.

There is another ground which would seem sufficient to decide this case, if it were necessary to resort to it. The decree obtained in Scotland is enforceable *in personam*, and it establishes the trusts against Lord Ruthven. In my opinion, he must get rid of that decree, as well as of the deeds, before he can deny that he is a trustee.

It is idle to contend at this stage that he can treat the deeds as void on the ground of mistake, misrepresentation, or fraud. There is no suggestion of any other ground for his refusal to act on them.

There are, therefore, two answers to his case. We might treat the Scotch decree as establishing the *status* of trustee, and

(1) [1892] 1 Ch. 236.
(2) W. N. 1898, 148.
(3) Kay, 418.
(4) 32 Ch. D. 333.

Appeal. 1906. *In re* RUTHVEN'S TRUSTS. Fitz Gibbon, L.J.

as enabling us to make an order under section 31; but we also have facts which bring the case within Lord Lindley's decision in *Pagani's Case* (1), and show that specific performance would be granted as of course, and therefore that Lord Ruthven is "a trustee" within section 26. It is for the benefit of everyone to grant the application without further litigation. With all respect to Barton, J., section 31 seems to me to provide ancillary relief where a suit for specific performance has been brought to establish the rights of the parties. But that does not limit the jurisdiction of the Court to act under section 26 in cases where a suit is unnecessary, because the only result of it would be to make costs.

Lord Ruthven must bear the costs of the litigation caused by his refusal to do an act which a decree for specific performance would have compelled him to do, and which the Scotch Courts have already ordered him to do under pain of committal.

HOLMES, L.J. :—

In 1892 three documents were executed, the effect of which was that it was agreed by Lord Ruthven that property belonging to himself and to the Master of Ruthven should be conveyed to trustees upon certain trusts, among others, to pay certain debts of Lord Ruthven, and to pay to him and to his wife an annuity for their lives, and there was a further trust to sell the lands of Harperstown, in the county of Wexford. One of these documents signed by Lord Ruthven contained a declaration of trust to the above effect by the trustees. I do not propose to discuss the question whether this made Lord Ruthven an express trustee: it is sufficient if he is a constructive trustee. These documents were acted on ever since, the trustees going into possession of the lands, and receiving the rents thereof. In my opinion, there is no doubt that on the facts Lord Ruthven was at least a constructive trustee, and a constructive trustee is a trustee within the meaning of section 26 of the Trustee Act. The question is whether under that section we can now make a vesting order. If it could be shown to me that Lord Ruthven could raise any question as to

(1) [1892] 1 Ch. 236.

the validity or effect of these documents, I should hold that an action for specific performance ought to be brought and a decree obtained; but no one suggests that Lord Ruthven has any defence whatever, and I bring in the Scotch decree as strong evidence of the absence of all defence. That being so, I have to see if there is any authority to prevent a vesting order being made, to avoid the expense of unnecessary litigation and delay, in a matter where it would be for the benefit of all parties to make it. The authorities show that such an order can be made in a plain and clear case under section 26, and if there can be a case both plain and clear, the present is of that character (1).

Solicitors for the Master of Ruthven and the trustees: *O'Kearney & Barrington.*

Solicitors for Lord Ruthven: *Longfield, Kelly, & Armstrong.*

R. D. M.

O'HANLON *v.* LOGUE (2).

Charity—Gift to—Charitable purposes—Masses—Gift in perpetuity—No direction for celebration in public.

A bequest for Masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not.

The Attorney-General v. *Delaney* (I. R. 10 C. L. 104) overruled. *The Attorney-General* v. *Hall* ([1897] 2 I. R. 426) considered.

BY her will, dated the 10th July, 1891, Ellen M'Loughlin devised and bequeathed all her property to the Rev. Bernard O'Connor and Felix O'Hanlon, whom she appointed executors and trustees, upon certain trusts for her son John James M'Loughlin, until he should marry, and, if he die unmarried, on trust for her sisters Catherine and Mary Quinn, her brother Francis Quinn, and her nephew Charles Quinn, for their joint

(1) See also *Re General Accident Assurance Corporation, Limited* ([1904] 1 Ch. 147), and *Re No.* 9 *Bomore Road* ([1906] 1 Ch. D. 359).—[REP.].

(2) Before WALKER, C., PALLES, C.B., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1905. O'Hanlon v. Logue.

lives, and for the lives and life of the survivors and survivor of them, and after the death of the survivor, upon trust to sell and invest the proceeds, and "to pay the income thereof from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of my late husband, my children, and myself."

The testatrix died on the 25th April, 1893. By deed poll, dated the 14th June, 1893, the Rev. Bernard O'Connor disclaimed the trusts of the will, and probate was granted to Felix O'Hanlon.

The said John James M'Loughlin died on the 2nd November, 1898, unmarried, and Mary Quinn, Catherine Quinn, Francis Quinn, and Charles Quinn, the brother and sisters and nephew of the testatrix had died, or were presumed to be dead, having left Ireland, and not having been heard of for many years. The plaintiff, the executor, issued a summons for the construction of the will against Cardinal Logue, the Roman Catholic Archbishop of Armagh. The property consisted chiefly of house property in the town of Portadown, held under freehold tenure, and by order dated the 1st February, 1904, Sir Augustine Baker was appointed to represent the person who by devise, descent, or otherwise would be entitled to represent the real estate, as it was not known who the heir of the testatrix was.

On the 13th July, 1905, Porter, M.R., considering that he was bound to follow the decisions in *The Attorney-General* v. *Delaney* (1) and *The Attorney-General* v. *Hall* (2), held that the gift for Masses was void, as creating a perpetuity.

By an order in the action made on consent the answer of Dr. Delaney in *The Attorney-General* v. *Delaney* (1) was admitted in evidence.

The defendants appealed.

D. F. Browne, K.C. (with him *J. H. Pigot*), for the appellant:—

The question for decision is whether a gift simply for the celebration of Masses for the souls of the dead is a valid charitable

(1) I. R. 10 C. L. 104. (2) [1897] 2 I. R. 426.

gift. The decision of this question involves the reconsideration of the principle on which the case of *The Attorney-General* v. *Delaney* (1) was decided. A gift for the advancement of religion is a gift for a charitable purpose within the meaning of the term "charitable" in the statute 43 Elizabeth, c. 4, and the analogous Irish statute, 10 Car. 1, sess. 3, c. 1, enacted "for the advancement of pious intentions and the better execution of charitable uses and trusts." In its enumeration of charitable trusts, the Irish statute includes trusts "for the maintenance of any minister and preacher of the Holy Word of God," which were purposely omitted from the statute of Elizabeth (Duke 125). Of the numerous decisions in which gifts for the advancement of religion or for religious purposes have been upheld as charitable *The Attorney-General* v. *Herrick* (2), *Powerscourt* v. *Powerscourt* (3), *Townsend* v. *Carus* (4), *Farquhar* v. *Darling* (5), are typical examples. Trusts for the advancement of religion are included in Lord Macnaghten's enumeration of charitable trusts in the *Commissioners of Income Tax* v. *Pemsel* (6). A gift for the maintenance of religious worship is a gift for the advancement of religion: *Durour* v. *Motteux* (7); *Turner* v. *Ogden* (8); *Straus* v. *Goldsmid* (9); *Michel's Trusts* (10). In *Michel's Trusts* (10) there was no direction that the prayer "Candish" was to be said in public; the prayer was an essential part of the testator's purpose, and the gift cannot be regarded as an educational charity. A gift for the celebration of Masses is a gift for the maintenance of the religious worship of a religion which, since the Irish Toleration Act, 33 Geo. 3, c. 21, has been declared to be legal in Ireland, and such a gift is therefore charitable. The supplemental answer in *The Attorney-General* v. *Delaney* (1) states the nature of a Mass, which was known to the Common Law, and it also states the doctrine of the Catholic Church as to the Sacrifice of the Mass.

The statute 10 Car. 1, sess. 3, c. 1, after enumerating several

(1) I. R. 10 C. L. 104.
(2) 2 Amb. 712.
(3) 1 Molloy, 616.
(4) 3 Hare, 257.
(5) [1896] 1 Ch. 50.
(6) [1891] A. C. at p. 583.
(7) 1 Ves. Sen. 320.
(8) 1 Cox Ch. C. 316.
(9) 8 Sim. 614.
(10) 28 Beav. 39.

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classes of charitable uses, contains the general words "or for any other like lawful and charitable use and uses, warranted by the laws of this realm now established and in force," and treats those uses and trusts as pre-existing and valid: *Incorporated Society* v. *Richards* (1). Gifts for Masses not directed to be celebrated in public were, prior to the Reformation, charitable. The Statute of Westminster first enabled persons deputed by the ordinaries to recover debts due to those who died intestate "to administer and dispend for the souls of the dead." The Spiritual tenures in Frankalmoigne and by Divine Service recognised the validity of gifts for Masses: Co. Litt., 94a, 95b; Perkins' Conveyancing, ss. 541, 563. Where a tenant, holding by Divine Service, failed to perform the Services, a writ of *cessavit* lay for not doing the Services: Fitzherbert, Natura Brevium, ii. 209.

Gifts for Masses not directed to be said in public must, previously to the Reformation, have been held to be charitable and not merely pious, for these gifts created perpetuities; and unless they were held to be charitable, and therefore exceptions to the rule against perpetuities, they must have been held to be void, for the law abhorred perpetuities: Co. Litt., 223a; 2 Vern., 164.

The common law as to Masses for the dead was altered in England by the Statute of Chauntries, 1 Edw. 6, c. 14, which declared uses for the celebration of Masses and for prayers for the souls of the dead to be superstitious, and declared the lands limited to such uses forfeited to the King. The statute applied only to such uses: *Adams and Lambert's Case* (2). After the Reformation a charitable foundation for saying Mass is adjudged to be performed by saying the service according to the Liturgy: Co. Litt., 95b; Bacon's Abr. Charitable Uses and Mortmain (D).

The decision in *West* v. *Shuttleworth* (3) and the other English cases in which gifts for Masses were held to be superstitious and therefore illegal, were founded either on the express enactment of the statute 1 Edw. 6 or on the analogy of that statute. The 1 Edw. 6 did not extend to Ireland. By the repeal of the penal laws subsequently passed, the charitable character of gifts for

(1) 1 Dr. & War. 325. (2) 4 Rep. 96, 116. (3) 2 Myl. & K. 684.

Masses, which the law recognised before the Reformation, was revived, and gifts for Masses in Ireland were again held to be charitable. The decision in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1) establishes this. That case not merely decided that gifts for Masses are valid; it also involved the decision that gifts for Masses are charitable, irrespective of the mode in which the Masses are to be celebrated. There is no indication that the decision which held the gifts for Masses to be charitable at all depended upon a direction, express or implied, that the Masses should be celebrated in public. The Master of the Rolls in *Read* v. *Hodgens* (2) held that the question was concluded by the decision in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), and on the authority of that decision he upheld a bequest of residue which the testator directed "to be expended for Masses for my soul's sake." In neither case was any importance attached to the mode of celebrating the Masses. It was first suggested in the judgment in *The Attorney-General* v. *Delaney* (3), though not actually decided in that case, that the charitable purpose in a gift in Ireland for Masses is to be found in the edification of the public congregation attending an act of public worship; and that to make such a bequest charitable, there must be a direction for the celebration of the Masses in public. In *The Attorney-General* v. *Hall* (4) this Court decided that a bequest for Masses to be publicly celebrated in Ireland is a valid charitable bequest. In his judgment, Lord Justice Fitz Gibbon considered the foundation of the law that bequests for Masses are valid in Ireland "in order to see whether it is possible to base their validity upon any principle which will not also establish their charitable character, irrespective of the mode of celebration": *The Attorney-General* v. *Hall* (4). When dealing with the decision of Lord Manners in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), and of Blackburne, M.R., in *Read* v. *Hodgens* (2), the Lord Justice says (p. 444):—"I cannot believe that the charitable or non-charitable character of the bequests was regarded by either of these Judges as depending upon the mode of celebrating the Masses; and I am almost

(1) 7 I. Eq. R. 34, note.
(2) 7 I. Eq. R. 17.
(3) I. R. 10 C. L. 104.
(4) [1897] 2 I. R. 426.

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forced to the conclusion that both Judges upheld the bequests as being charitable. If Lord Manners did so, I think it clear that Blackburne, M.R., thought he was doing likewise." Lord Justice Walker held that the decree of Lord Manners is framed on the assumption that the bequests were not only legal but charitable. These judgments are inconsistent with the *ratio decidendi* in *The Attorney-General* v. *Delaney* (1). There is in a bequest for Masses a charitable purpose other than the edification of a public congregation. The Mass is the highest and most solemn act of worship in the Catholic liturgy. According to the doctrine of the Catholic Church, the celebration of Mass in public or in private confers a public benefit. The Court cannot consider the question whether that doctrine is true or not; it is enough that that doctrine is believed by a body of persons recognised as part of the public, and that the belief involves no illegality. The charitable nature of the purpose must be determined according to the belief of the testator. In *Webb* v. *Oldfield* (2), at p. 447, Fitz Gibbon, L.J., says: "What is the tribunal which is to decide whether the object is a beneficent one? It cannot be the individual mind of a Judge, for he may disagree, *toto cœlo*, from the testator as to what is or is not beneficial. On the other hand, it cannot be the *vox populi*, for charities have been upheld for the benefit of insignificant sects and of peculiar people. It occurs to me that the answer must be—that the benefit must be one which the founder believes to be of public advantage, and his belief must be at least rational and not contrary either to the general law of the land or to the principles of morality."

Although Mass may be celebrated in private, it is primarily an act of public worship. The liturgy of the Mass contemplates the presence of a congregation. Some of the prayers are responded to by the clerk. And at several parts of the Mass the priest addresses the congregation.

A gift for the celebration of Masses, whether the Masses are to be celebrated in private or in public, is charitable, inasmuch as it is a gift for the maintenance or benefit of a minister of religion in the exercise of his functions. The supplemental answer in *The*

(1) I. R. 10 C. L. 104. (2) [1898] 1 I. R. at p. 446.

Attorney-General v. *Delaney* (1) proves that the *honoraria* for Masses form portion of the ordinary income and means of livelihood of priests. In *Penstred* v. *Pavier* (2) a devise of £20 per annum to a "preaching minister" was upheld as charitable. *Pember* v. *The Inhabitants de Kington* (3), *Joyce* v. *Osborne* (4), *The Attorney-General* v. *Cock* (5), *Grieves* v. *Case* (6), *The Attorney-General* v. *Todd* (7), *Thornber* v. *Wilson* (8) are to the same effect. In *Robb and Reid* v. *Dorrian* (9) the majority of the Judges in the Exchequer Chamber held that the devise to the Bishop of Down and Connor was charitable. At page 299 of his judgment in that case Palles, C.B., says—"I am of opinion that the functions of the priesthood being such that their discharge is deemed to be for the benefit of the public, perpetuation of the Order of the priesthood must also be deemed to be for the public benefit, and that a trust for that purpose is a public, charitable use."

In *The Attorney-General* v. *Hall* (10), FitzGibbon, L.J., says—"It is enough to say that where, according to the religious belief of a body of persons recognized as part of the public, an act of religion done by a public minister of their Church is for the spiritual advantage of them all, a bequest for the benefit of a minister of religion to perform that act must be deemed to be charitable."

J. H. Pigot:—

It would certainly be extraordinary if, in a case of a gift for Masses for the repose of a testator's soul, *simpliciter*, and it being conceded that Masses said in public are proper objects of a charitable gift—*The Attorney-General* v. *Hall* (10)—the bequest should fail and the money not be applicable to carry out the clear intention of the testator: *Richardson* v. *Murphy* (11).

It is argued for the respondent that the Court cannot decree this to be a charitable gift, since the Court cannot be satisfied by

(1) I. R. 10 C. L. 104.
(2) Tothill, 34.
(3) *Ibid.*
(4) Nelson, 40.
(5) Amb. 201.
(6) 1 Ves. Jun. 546.
(7) 1 Keen, 803.
(8) 3 Drew, 245.
(9) I. R. 11 C. L. 292.
(10) [1897] 2 I. R. 426, at p. 449.
(11) [1903] 1 I. R. 227.

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proof that benefit or edification does in fact accrue to a section of the public, and since the Court cannot control the carrying out of the intention.

There are two replies to this argument.

First: It is not supported by authority, with the exception of *The Attorney-General* v. *Delaney* (1), which we contend was wrongly decided, and those Irish cases which have since followed that decision.

Secondly: It is impossible, in the essence of the thing, to prove that any material benefit does, in fact, result from the performance of a religious ceremony, no matter where said, and, therefore, the true test is the intention of the testator.

On the first point: from the earliest time in the history of the Common Law, gifts in perpetuity of property (including lands) to provide perpetual Masses for the repose of the soul of the grantor or donor were good: (Lyttleton's Tenures, p. 363; Fitzherbert, De Nat. Brev.; Writ of Cessavit; *Adams and Lambert's Case* (2); Perkins, p. 563, *circa* 15 Henry 8). In the last-mentioned case the gift in remainder was one made by will, affecting fee-simple lands, precisely similar to this. In none of these was public ceremonial prescribed as necessary by the terms of the gift. Thus, up to the time of the beginning of the Reformation, a gift for Masses *in memoriam*, in perpetuity, *simpliciter*, was good, even as affecting lands. Why? The law has at all times abhorred a perpetuity: Co. Litt., p. 223*a*; 2 Vern., p. 164. The true explanation is that charities had always been treated as exceptions to the rule as to perpetuities, and were so recognized. The Court always exercised a jurisdiction over charities prior to the passing of the Statute of 43 Elizabeth (*per* Lord St. Leonards in *Incorporated Society* v. *Richards* (3)). It can only have been on that ground that gifts, otherwise bad as perpetuities, were held to be good.

The Statute of Chauntries, 1 Edw. 6, did not apply to Ireland. There is no such thing as a "superstitious use," resulting in a forfeiture to the King, in this country. Nor has any change occurred in the law either in England or Ireland to extend or restrict the class of gifts which were charitable at the time of the

(1) I. R. 10 C. L. 104. (2) 4 Rep. 104. (3) 1 Dr. & War. at pp. 319-324.

passing of the statute 43 Elizabeth (of which the Irish statute of Charles 1 is practically a copy): see judgment of Sugden, L.C., in *Incorporated Society* v. *Richards* (1), at pp. 300, 301, and 302. We admit that during the time of the currency of the penal laws the saying of Mass at all was illegal. But all those disabilities were finally put an end to by the 21 & 22 Geo. 3, c. 24, and may be disregarded for the purposes of this argument, as they left the law otherwise unaltered.

It lies then on the other side to show that what was a good charitable gift immediately prior to the Reformation has been affected since then, so as to make it, in Ireland, no longer a charity. The authorities without exception up to the decision in *Delaney's Case* (2) are in favour of this view. In 1823, Lord Manners decided in *The Commissioners of Charitable Donations* v. *Walsh* (3) that the "solemn" Masses therein referred to were the object of a good charitable gift. But he also decided that the gift of £20 per annum to "the third clergyman of Mullingar," with a precatory trust attached thereto, for the saying of Masses for the testatrix's soul, was a valid charitable gift; one quite distinct from the earlier bequest. (See judgment of Palles, C.B., in *The Attorney-General* v. *Hall* (4): "This case decided two propositions," &c.). In the argument in *Walsh's Case* (3), *The Attorney-General* v. *Fowler* (5) was relied on, thus showing that charity was the *ratio decidendi*, as the term "charitable bequests" in the decree also proves.

Read v. *Hodgens* (6) followed this last case, the Court reserving judgment after full argument; and the case cited in the judgment of Blackburne, M.R., shows that here too the point under consideration was charity or no charity.

Felan v. *Russell* (7), though not a gift for Masses expressly, was one with a direction that the services were to be for the benefit of the testatrix's soul.

In none of these cases is there any direction, so far as relates to the gifts on which we rely, for a public ceremonial.

(1) 1 Dr. & War. 258, 300.
(2) I. R. 10 C. L. 104.
(3) 7 Ir. Eq. 34, note.
(4) [1896] 2 I. R. at p. 303.
(5) 15 Ves. 85.
(6) 7 Ir. Eq. R. 17.
(7) 4 Ir. Eq. R. 701.

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The judgment of Palles, C.B., and of the other Judges who, with him, decided in *Robb and Reid* v. *Dorrian* (1) that the gift for Masses was good as being charitable, also supports this contention.

On the second point, the authorities show that the nature of charitable gifts depends on their subjective aspect only (*Webb* v. *Oldfield* (2); *In re Foveaux* (3)).

Neither in *Straus* v. *Goldsmid* (4), nor in *Michel's Trusts* (5), would it have been possible to obtain evidence of tangible or actual benefit, or even of the discharge of the prescribed ceremony; nor could the Court have exercised any control over its performance. In the last-mentioned case the saying of the Hebrew prayer "Candish" must in itself have been held to be the proper subject of a valid charitable gift, for otherwise the whole gift would have been bad, if part only of the subject-matter had been charitable.

It cannot be proved that benefit accrues to those assisting at the celebration of one admittedly charitable ceremony, viz. the service of the Established Church in England. The poverty of the donee of the charitable gift is out of the case: *The Commissioners of Income Tax* v. *Pemsel* (6). Two cases only appear *prima facie* to be inconsistent with our contention. In *Da Costa* v. *De Paz* (7) the decision was given before the Jewish Toleration Act had passed. In *Neo* v. *Neo* (8) the direction as to the tombs was clearly bad, within the authority of cases of the class of *Hoare* v. *Osborne* (9), as not connected with the fabric of a church. The latter gift in that case was held to be bad, either as a superstitious use within the statute of Edward 6, which does not apply to this country, or on account of personal motive, a point now disposed of in *The Attorney-General* v. *Hall* (10).

On the authorities, and in the reason of the thing, such a gift as this now under consideration must be held to be charitable.

(1) I. R. 11 C. L. 292.

(2) [1898] 1 I. R. 431. Lord Ashbourne, at p. 445; FitzGibbon, L.J., at pp. 446, 447; Walker, L.J., at pp. 449-451.

(3) [1895] 2 Ch. 501. See concluding words of judgment of Chitty, J.

(4) 8 Sim. 614.

(5) 28 Beav. 39.

(6) [1891] A. C. 583.

(7) 2 Swanst. 487, note.

(8) L. R. 6 P. C. C. 381.

(9) L. R. 1 Eq. 585.

(10) [1897] 2 I. R. 426.

S. L. Brown, K.C., and *G. C. Green*, for the heir-at-law :—

There is no clear authority before *The Attorney-General* v. *Delaney* (1), from which this is an appeal. We are, therefore, driven back to the principles upon which this case must be decided. We are not concerned with the meaning of the word "charitable" in any sense other than its legal sense. In order that a gift may be charitable, in the legal sense, it must fulfil three conditions—(*a*) It must be for the benefit of the public, or some section of the public; (*b*) it must be one as to which the Court can decide on legal *evidence* that it will confer the benefit on the public which the donor believed it would confer; (*c*) it must be enforceable by the Court. It is unnecessary to cite authorities for the first of these conditions. The gift must be for some of the purposes specified in the statute of Elizabeth, or some purpose analogous thereto. The second condition is that which really distinguishes a purpose which is charitable, in the legal sense, from one which is not so. A purpose may, according to the belief of the donor, or of a large section of the public, be beneficial to the public; but unless this purpose be one which the Court can itself ascertain and determine to be beneficial to the public, it is not a charitable purpose in the legal sense. In ascertaining and determining this question, the Court must act on legal evidence, and cannot act merely on the belief of the donor, or of persons who hold the same views. It is admitted that the Masses may, in this case, be said in private, and the only evidence for the proposition that the celebration of the Mass in private confers a public benefit is the belief of the donor and the Roman Catholic Church to that effect. This is not evidence on which a Court can act. The third condition of validity is also wanting in this case. As the Masses may be said in private, the purpose is one which the Court cannot enforce.

With reference to the argument founded on the law prior to the Reformation :—Perpetual gifts for Masses were held good prior to the Reformation, not because they were charitable, but because they were for the benefit of the Church. No argument can be based on decisions prior to the Reformation. Since the

(1) I. R. 10 C. L. 104.

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disestablishment of the Church in Ireland all forms of belief are on the same footing in the eye of the law, and the validity of a charitable gift can no longer be established by reference to any particular belief, but must be proved by such evidence as a Court can act on. [They cited the following cases:—*The Attorney-General* v. *Delaney* (1); *The Attorney-General* v. *Hall* (2); *Morice* v. *Bishop of Durham* (3); *Kendall* v. *Granger* (4); *Cocks* v. *Manners* (5); *Ommaney* v. *Butcher* (6)].

1906. Feb. 2.

WALKER, C.:—

In this case Felix O'Hanlon, the trustee of the will of Ellen M'Laughlin, applied by summons to the Master of the Rolls to have the important question involved in the appeal decided, whether a gift for the celebration of Masses for the repose of the souls of her named relatives and herself was a valid charitable gift, though the will contains no direction that such Masses should be celebrated in public.

The gift is contained in a direction by the testatrix to her trustees to sell, in the events that happened, the leasehold mentioned in the will, "and to pay over the income of the proceeds from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of her late husband, her children, and herself."

The Master of the Rolls by his order, dated 13th July, 1905, has decided that this gift is void, and His Eminence Cardinal Logue has appealed.

It would have been impossible, I think, for the Master of the Rolls, having regard to the existing decisions, to have made any different order than he did. But we have been asked, and are compelled, to reconsider the principle upon which the decisions in *The Attorney-General* v. *Delaney* (1) and *The Attorney-General* v. *Hall* (2) rest; and assuming it to have been now determined in this Court that a gift for Masses for the repose of the souls of the

(1) I. R. 10 C. L. 104.
(2) [1896] 2 I. R. 291; [1897] 2 I. R. 426.
(3) 9 Ves. 399; 10 Ves. 522.
(4) 5 Beav. 300.
(5) L. R. 12 Eq. 585.
(6) Turn. & Russ. 260.

dead to be celebrated in public is a valid charitable gift, to consider further whether such a gift is valid though there be no direction for celebration in public—in other words, whether its validity as a charitable gift does not rest upon far higher grounds than the existence of a direction for public celebration.

I have had the advantage of reading the elaborate judgment which will be delivered by the Lord Chief Baron. The Court of Exchequer, presided over by the Lord Chief Baron, decided in *The Attorney-General* v. *Delaney* (1) that a gift simply for the celebration of Masses was not a valid charitable gift; but the Chief Baron expressed the opinion that such a gift would be valid if there were a direction that the Masses should be celebrated in public. That opinion of the Chief Baron passed into decision in the case of *The Attorney-General* v. *Hall* (2), and in this Court it did not become necessary for our decision to go beyond that. I was satisfied myself that the point before us would arise later, and I then thought there was no valid reason for differentiating between the two classes of cases. Lord Justice Fitz Gibbon, however, did not shrink from considering the larger question on principle. He says—"I find it necessary to look more deeply for the real foundation of the law, which the Attorney-General has expressly declined to challenge, viz. that bequests for Masses are valid, in order to see whether it is possible to base their validity upon any principle which will not also establish their charitable character, irrespectively of the mode of celebration." Further consideration has satisfied the Chief Baron that the validity of the gift as a charitable one does depend upon a principle which is irrespective of the mode of celebration, and I concur with him in that result.

There are some legal propositions germane to the case for which it would be mere pedantry to cite authority:—(*a*) That in speaking of what is "charitable" we use the word in the artificial sense, which is derived from the statute 43 Eliz. c. 4 (Eng.), and 10 Car. 1, sess. 3, c. 1 (Ir.); (*b*) That included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (*c*) That a gift for the advancement of "religion" is a charitable gift; and that in applying this principle, the Court does

(1) I. R. 10 C. L. 104. (2) [1897] 2 I. R. 426.

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not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the law, and this especially applies since the abolition in this country of a State Church. Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality. A remarkable illustration is furnished by the decision in *Webb* v. *Oldfield* (1), a gift for the spread of vegetarian principles—ideas that might be in the view of many erroneous and visionary.

It may also be treated as settled law that in Ireland a gift for Masses is not illegal as a superstitious use. On that point *Read* v. *Hodgens* (2) is a binding and accepted authority; and the case of *The Commissioners of Charitable Donations* v. *Walsh* (3) has been treated as a decision to the same effect, though it may well be that a careful examination of the gifts there might show, as pointed out by the Lord Chief Baron, that one gift involved a public celebration, and the other an endowment of religion. In pre-Reformation times a gift for Masses would be valid at Common Law and charitable, as that word must be interpreted.

In *The Attorney-General* v. *Delaney* (4) evidence was given by Dr. Delaney as to the exact nature of a Mass. He states that, according to the doctrine of the Roman Catholic Church, the Mass is a true and real sacrifice offered to God by the priest, not in his own person only, but in the name of the Church whose minister he is. Every Mass, on whatever occasion used, is offered to God in the name of the Church, to propitiate His anger, to return thanks for His benefits, and to bring down His blessings upon the whole world. Some portions of the Mass are invariable, and some are variable. Amongst those invariable are an offering of the Host for his own sins, and for all present, and also for all faithful Christians both living and dead; and the sacrifice is offered for the Church, and the granting to it of peace, and its preservation and union. It includes commemoration of the living

(1) [1898] 1 I. R. 431.
(2) 7 Ir. Eq. R. 34.
(3) *Ibid.* 34, note.
(4) I. R. 10 C. L. 104.

and of the dead; and he states it is impossible, according to the doctrine of the Church, that a Mass can be offered for the benefit of one or more individuals living or dead, to the exclusion of the general objects included by the Church. When a *honorarium* is given for the purpose of saying a Mass for a departed soul, the priest is bound to say it with that intention; but that obligation may be discharged by a mental act of the priest, but it cannot be discharged by the ordinary parochial Mass which he says on Sundays and holidays. Such *honoraria* for Masses form portion of the ordinary income and means of livelihood of priests, and are generally in Ireland distributed, by those to whom the distribution is entrusted, amongst priests whose circumstances are such that they stand in need of the assistance offered.

Such is the evidence as to the exact nature of the Mass, both generally, and where a commemoration of named dead is included. It is settled by authority which binds us that where there is a direction to celebrate the Mass in public, the gift is a valid charitable one; but what makes it charitable is the performance of an act of the Church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation. Furthermore, adopting the evidence of Dr. Delaney, it seems to me that the bequest of a sum of money for the saying of Masses, which cannot be satisfied by the ordinary parochial Mass, and the conferring of *honoraria* upon the priests who celebrate the Masses, are an endowment of the priest who celebrates this solemn sacrifice, and therefore an advancement of religion just as much in principle as the erection of a Church in which they might be said, or the endowment of an additional priest to celebrate them.

Authority is not needed for the proposition that a gift for such a purpose would be a good charitable one. I may mention *Powerscourt* v. *Powerscourt* (1) and *Lea* v. *Cooke* (2).

I think the appeal should be allowed, and the question answered according to the result of our decision.

(1) 1 Moll. 616. (2) 34 Ch. D. 528.

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PALLES, C.B. :—

I concur with the Lord Chancellor in the opinion that this appeal should be allowed; but as doing so involves the disaffirmance of the judgment in *The Attorney-General* v. *Delaney* (1), to which I was a party, I desire to consider in some detail the question involved.

The decision of this Court in *The Attorney-General* v. *Hall* (2) overruled all the objections to the charitable nature of the bequest there under consideration; a bequest which differs from that as to which the question here arises by a single circumstance only, the absence here of a direction that the Masses shall be celebrated in public.

Thus the question is: Is it an essential condition to the celebration of Mass being charitable that it should be in public?

In my view, *The Attorney-General* v. *Delaney* (1) is the earliest decision in this country on the subject. The subsequent decisions were based upon it as the decree of a Court of co-ordinate jurisdiction. They therefore will not require separate examination, as if the former be overruled, the others must necessarily share the same fate.

It is true that the nature of a bequest for Masses was considered in two earlier cases—in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (3), in 1823, and in *Read* v. *Hodgens* (4), in 1844—but the effect of the absence of a direction for public celebration does not appear to have been relied upon in either. It is not, however, for this reason alone that neither of these prior cases can, in my opinion, be relied upon as a decision that a celebration otherwise than in public is charitable. In neither of them was there any evidence that the terms of the bequest could be complied with otherwise than by public celebration.

In the principal bequest in the first of these cases—*The Commissioners of Charitable Donations and Bequests* v. *Walsh* (3)—the services specified in the bequest were "*solemn* Masses," at each of which thirteen clergymen were, if possible, to be present, "to perform the *rites accustomed* on these occasions." It was, and is, the

(1) I. R. 10 C. L. 104.
(2) [1897] 2 I. R. 426.
(3) 7 Ir. Eq. R. 34, note.
(4) *Ibid.* 17.

common knowledge of every Roman Catholic that the services there pointed at are what are known as "Offices for the Dead," which are necessarily celebrated in public, so that the terms of that bequest were inconsistent with private celebration.

The only other material bequest there was of £20 yearly "to a third clergyman for the *attendance of this parish*, for which I hope he will offer a weekly Mass for the repose of my soul and the benefit of my son." Such a bequest for an additional clergyman for the parish would have been charitable, even had there not been a request for the celebration of Masses: *Thornber* v. *Wilson* (1).

In the second case—*Read* v. *Hodgens* (2)—the only question argued was whether the bequest was superstitious, and therefore void: in other words, whether the law, or policy of the law, which in *West* v. *Shuttleworth* (3) was held to underlie the English statute 1 Edw. 6, c. 14, applied to this country, in which there was no analogous statute. It was decided "in deference to the decree" in the earlier case which, in the opinion of the Master of the Rolls, "closed all further discussion on the point"; and that learned Judge stated that he had not formed any opinion of his own. That case, therefore, did not decide anything which had not been ruled by the earlier decision.

Whilst these two cases were most important on the question afterwards decided in *The Attorney-General* v. *Hall* (4), viz. the charitable nature of a Mass celebrated in public, they do not determine the controversy here, further than by showing two very important matters—(*a*) that the Mass was not in this country deemed to be superstitious, and (*b*) that its charitable character was not affected by a request for a particular memorial. They are express authorities that the words of Lord Cottenham, when Master of the Rolls (3), that in such a case "the intention was not to benefit the priests or to support the chapels, but to secure a supposed benefit to the testatrix herself," are not law in this country. Incidentally, I may remark that the English statute 23 & 24 Vict. c. 134, "The

(1) 3 Drew. 245.
(2) 7 Ir. Eq. R. 17.
(3) 2 Myl. & K. 684.
(4) [1897] 2 I. R. 426.

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Roman Catholic Charities Act," which was passed in 1860 to modify the effect of the law laid down in *West* v. *Shuttleworth* (1), affords an argument, almost conclusive in my mind, to show that this difference did exist between the laws on this subject in England and in Ireland; as it is impossible to believe that the relief conferred by that statute would have been confined to England and Wales, if the mischief intended to be remedied extended to Ireland also. The Legislature, by that Act, legislated upon the basis that the law in each country was that which it had been judicially declared in each to be; and consequently that statute is almost a statutable recognition of the decisions in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (2) and *Read* v. *Hodgens* (3).

Thus stood the law in this country prior to the decision in *The Attorney-General* v. *Delaney* (4). To arrive at the *ratio decidendi* there of the question now before us, I must eliminate so much of it as relates to the many questions that had to be decided there, but which do not arise here: questions as to the force of the word "merely" preceding "charitable," in section 38 of 5 & 6 Vict. c. 82 (on the construction of which the liability to the duty there claimed arose); as to the bequest there, being a "legacy" within the meaning of that Act; as to the person who was to be deemed to be the legatee; and as to the mode in which the amount of the benefit conferred was to be ascertained. All these matters had to be considered and determined there, as preliminary to the existence of the question here.

Coming, then, to the actual *ratio decidendi* there, after long and serious consideration which has been forced upon me by the various subsequent decisions on the question, including *The Attorney-General* v. *Hall* (5) (in the judgment in which, in the Exchequer Division, I took part)—a consideration which now, for the first time since the decision in *The Attorney-General* v. *Delaney* (4), I am obliged to bring to a judicial test—I feel that the decision cannot be supported. I further feel that had I pressed to its legitimate conclusion the difference of opinion which existed there between me and my learned brothers, I should have found

(1) 2 Myl. & K. 684.
(2) 7 Ir. Eq. R. 34, note.
(3) *Ibid.* 17.
(4) I. R. 10 C. L. 104.
(5) [1897] 2 I. R. 426.

that the opinion I expressed there, that the public celebration of a Mass was charitable, necessarily led to the conclusion that its celebration, although not in public, was of the same character, and that, too, upon the basis upon which the judgment proceeded—that the public benefit necessary to charity must be one which the Court itself could ascertain and declare.

To show the exact point in the reasoning in which, in my opinion, the error lies, renders necessary a rather lengthened examination of the judgment.

I commence with the position the argument had arrived at, after the cases of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1) and *Read* v. *Hodgens* (2) had been considered, and *West* v. *Shuttleworth* (3) distinguished. The judgment then proceeded, in some sentences which I may be excused for repeating, as to do so is necessary to enable my present view to be understood.

The position is stated thus: "Assuming the bequests not to be illegal, and considering them in a country in which there is now no established church, the acts directed to be procured are, *according to the faith which the testatrix professed*, sacrifices to God in the most proper sense and of the most solemn kind, on behalf of all the faithful, living and dead, including a particular memorial of the deceased person specified. On the other hand, they are not necessarily to be offered in the public congregation of the faithful, or in public at all."

To this I should now add, that as the nature and character of a Mass was known to the Common Law in pre-Reformation times, so after the Reformation, and to the present, that nature, and the Roman Catholic belief in reference to it, continue to be known to that law.

The judgment then proceeds to make it clear that in pre-Reformation times the purpose would have been held charitable, in the sense in which that word was used prior to the statutes of 43 Elizabeth, c. 4 (Eng.), and 10 Charles 1, sess. 3, c. 1 (Ir.): "The element of charity, in its most extensive, indeed in its truest sense, which they (the bequests) contain, is piety to God. There

(1) 7 Ir. Eq. R. 34, note. (2) 7 Ir. Eq. R. 17. (3) 2 Myl. & K. 684.

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is no doubt that, *according to the Roman Catholic faith*, each celebration of the Mass involves the most perfect act of charity. But further than this, it appears to me plain that, before the Reformation, bequests for these very purposes were not only legal, but were enforceable by the Ordinary as other charitable bequests."

In support of this, reference is made to the provision in the Statute of Westminster the 1st, that in case one dies intestate, the Ordinary shall depute his nearest and most lawful friends to administer his goods "*and dispend for the soul of the dead*"; and to the opinion expressed by Lord Eldon in *Moggridge* v. *Thackwell* (1), that the favour with which bequests for charitable purposes (not coming within the Mortmain Acts) have been treated in Courts of Equity, may have had its origin in the practice recognized in that statute. The judgment then adds:—"It seems unnecessary to pursue this subject. The history of the country, and the Statute Law subsequent to the Reformation, appear to me to render the question free from doubt. I concur in the argument of the defendant's counsel that, prior to the Reformation, these bequests would have been deemed pious."

To all this I still adhere. Then the judgment proceeds:—"The next proposition urged by the defendant's counsel is, that assuming the bequests could, prior to the Reformation, have been deemed pious, as every objection arising from illegality and from the existence of an established church has been removed, the bequests are now to be viewed as they would have been before the Reformation; and as they would have been then deemed pious, they must now be deemed charitable." To this an answer is given which I still think is correct: "This is not the real question which we have to decide. We are bound down within much more narrow limits. Our province is confined to determining whether the purpose in question is one 'merely charitable,' within the 5 & 6 Vict. c. 82, section 38"—words which the judgment proceeds to show mean, in reference to the bequests there, "charitable" within the meaning of the Acts 43 Eliz., c. 4 (Eng.) and 10 Charles I., sess. 3, c. 1 (Ir.), or analogous to the purposes therein mentioned.

It was at this point that, in my opinion, the judgment erred.

(1) 7 Ves. 69.

Having ascertained the character which the purpose should answer in order to be charitable, it should have proceeded to ascertain the effect, upon bequests for the celebration of Masses, of the Reformation statutes, and from that effect, ascertained what it could of its nature and character, as recognized and acknowledged by law, at and after the Reformation. Instead of doing this, the judgment, after rightly stating that a purpose, to be within the statutes of Elizabeth and Charles, must, to some extent at least, "be in the nature of a general public use . . . of such a nature that the Court can determine that it can confer a benefit upon the public, or upon some section of the public," proceeds, without, as I now think, sufficient consideration of the nature which the law attributed to the Mass in post-Reformation times, to hold that the bequests "could not derive the element of public benefit from the efficacy, spiritual or temporal, which, *according to the faith of the testatrix*, the religious act may possess," that the *only* public benefit the law could recognize as flowing from its celebration was the edification of the congregation, and that, as the presence of a congregation was not essential, the gift was not charitable.

Going back now to the effect of the Reformation Statutes on gifts for Masses, the nearest analogies which I can find to such gifts, with a particular memorial, but without any direction that the celebration shall be in public, are the old common law spiritual tenures to which we have been referred by Mr. Browne and Mr. Pigot during their able and interesting arguments—tenure by "frankalmoyne" and tenure by "divine service." These two tenures differed from each other mainly in this: that in frankalmoyne a certain service could not be reserved; in tenure by divine service the service should be certain, and this distinction had a result not unimportant—that in default of performance, if the tenure were that firstly mentioned, the lord could not distrain, whilst if it were the second he could. The legality of the distress should necessarily be determined, if disputed, in a temporal, as distinguished from an ecclesiastical, Court; and Lord Coke says(1): "If issue be taken upon the performance of the divine service, it

(1) Co. Lit. 96 (b).

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shall be tried by a jury of twelve men." Thus the Common Law had to determine, and consequently was able to determine, whether a particular Mass had been offered up with the specified intention. This disposes of one objection much pressed here and in *The Attorney-General* v. *Hall* (1), the strenuous denial that a temporal Court had either the power or the means of determining such a matter.

I come now to the description of these tenures. The former is thus described by Littleton (2):—"Tenant in frankalmoigne is where an abbot, or prior, or another man of religion or of Holy Church, holdeth of his lord in frankalmoigne, that is to say in Latin, *in liberam eleemosinam*, that is, in free almes; and such tenure beganne first in old time," meaning of course before the statute *Quia Emptores*. "Where a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same lands infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successours in pure and perpetual almes or in frankalmoigne . . . In such case the tenements were holden in frankalmoigne."

The services which those who held under this tenure were to render to their feudal lord are stated in section 135 (*b*):—"And they which hold in frankalmoigne are bound of right *before God* to make orisons, prayers, masses, and other divine services for the soules of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall do no fealty to their lord, because that this divine service is better for them before God than any doing of fealty; and also because that these words (frankalmoigne) exclude the lord to have any earthly or temporal service, but to have onely divine and spirituall service to be done for him." In case of non-performance under this tenure, the complaint (differing in this respect from that in tenure by divine service) should, according to Littleton, be "to their Ordinary or Visitour" (3).

In section 137, Littleton describes tenure by divine service thus (4):—"But if an abbot or prior holds of his lord by a certain

(1) [1897] 2 I. R. 426.
(2) S. 133; Co. Litt., 93 (b).
(3) S. 136.
(4) Co. Litt., 96 (b).

divine service in certaine to be done, as to sing a masse everie Friday in the weeke for the soules, *ut supra*, or everie year at such a day to sing a *placebo et dirige*, &c., or to find a chaplain to sing a masse, &c., or to distribute in almes to an hundred poore men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distreyne . . . and such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by divine service . . . for none can hold in frankalmoigne if there be expressed any manner of certain service that he ought to doe."

It is not stated in the above passages, or in any of the old books treating of the tenure of frankalmoigne that I have examined, that the divine service here referred to should be in public. The mode of its celebration under the tenure was that prescribed by the Church, and it is certain that the Church did not prescribe public celebration.

Before coming to the Reformation statutes, it is necessary to form a clear conception of the mode in which the Common Law regarded these gifts. Bracton says that "they were made, in a primary sense and principally, to God and to the Church, and in a secondary sense to the canons or monks or persons." His words are—"*Et ita quod primo et principaliter fit donatio Deo et ecclesiae, et secundario canonicis vel monachis vel personis*"; and so firmly was this principle established, that gifts took the form of gifts to God and a particular abbey and church. Sir Frederick Pollock and Mr. Maitland, in their learned and interesting "History of English Law before the time of Edward the First"(1), say:—"A gift, for example, to Ramsey Abbey would take the form of a gift 'to God and St. Benet of Ramsey Abbey, and the Abbot Walter and the monks of St. Benet,' or 'to God and the Church of St. Benet of Ramsey, and the Abbot and his monks,' or simply, 'to God and the Church of St. Benet of Ramsey,' or yet more briefly, 'to God and St. Benet'"; and they refer to particular charters which contain these words, and later on, in a note to a passage in Bracton, stating, "We do not make gifts to a parson and his successours, we make them to the Church, *e.g.* 'to God and the Church of St. Mary of Dale,'" they add this: "This remark seems

(1) Vol. I., page 222.

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fairly well supported by the practice of conveyancers in Bracton's time." So that the instances referred to are not isolated ones. They evidence the usual practice.

All this shows the true reason why the Common Law held the gifts pious. It was because they were gifts to God: gifts which provided for the worship of God. Even had the Common Law acknowledged more religions than one, it would have held pious any gift making provision for the worship of God, irrespective of the particular acknowledged religion according to which the worship was to be offered, provided only such religion were recognised as lawful. The gift here, as it is not illegal, is pious, according to the doctrines of all theistic religions, as all are based on a belief in the existence of the Deity, a belief that service and worship are due to Him, and a belief that the ministers of religion are the persons by whom the worship of the Church in its corporate unity is to be offered to Him. Thus, these gifts were not only pious before the Reformation, but, had they not been made illegal by statute, they would have been charitable within the meaning of the subsequent statutes of Elizabeth and Charles. As to this, *Powerscourt* v. *Powerscourt* (1) and *In re Darling* (2) are in point. In the first of these cases a devise to trustees to lay out at their discretion £2000 per annum till the testator's son became of age, "in the *service* of my Lord and Master, and, I trust, Redeemer"; and in the second, a gift "to the poor and the *service* of God," were held charitable, the first by Lord Manners, L.C., and the second by Lord Justice Stirling.

The religious act specified is, however, not to be disregarded. It was the divine service of one particular Church. The particular mode in which the general pious intention was to be carried out was by acts of worship of that Church in its corporate unity. The acts of worship of a church are admitted, by all theistic religions, to tend to discharge, to some extent, the debt due to God by the general body of the faithful, and to bring down upon them temporal and spiritual benefits. But these acts must be performed by ministers of that Church; and thus the gifts are in a two-fold manner charitable—first, and principally, by reason of the piety which is the essence of the gift to God, the gift which is to be applied to

(1) 1 Molloy, 616. (2) [1896] 1 Ch. 50.

His divine worship; and, secondly, by the mode in which it is to be so applied, viz. in the maintenance and support of the ministers by whom the acts of worship are to be performed. I have to add that, although Mass *may* be celebrated in private, its liturgy shows that it contemplates the presence of a congregation, although not as an essential part. The responses of the clerk are those of the congregation, who, by the "*Orate fratres*," is in words invited to participate in the worship; for whose reception of the Blessed Eucharist provision is made in the ritual; and who is, or possibly in Apostolic times a particular section of whom was, at the conclusion dismissed, by the words from which the name of the service is derived: "*Ite; Missa Est.*"

Having ascertained the character of these gifts, I come to consider the effect, upon these tenures by frankalmoyne and divine service, of the Reformation statutes, as this effect, to my mind, demonstrates that my last position is correct. These statutes are 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1; and 1 Eliz. c. 2, in England; and their Irish equivalent, 2 Eliz., c. 2 (Ir.). The English statutes prescribe the altered liturgies of divine service contained in the two Prayer Books, and the Irish statute prescribes that in the second Prayer Book of Edward 6. The effect of the English statutes is thus stated by Lord Coke, as a note upon the words of sect. 135, "to make orisons, prayers, Masses, and other divine services."

"Since Littleton wrote, the lyturgye or Book of Common Praier, and of celebrating divine service, is altered. This alteration notwithstanding, yet the tenure in frankalmoyne remaineth, and such prayers and divine service shall be said and celebrated as now is authorised; yea, though the tenure be in particular, as Littleton hereafter saith, viz. to sing a masse, &c., or to sing a *placebo et dirige*, yet if the tenant saith the praires now authorised, it sufficeth . . . And albeit the tenure in frankalmoyne is now reduced to a certainty contained in the Book of Common Praire, yet seeing the original tenure was in frankalmoyne, and the change is by general consent by authority of Parliament, whereunto every man is party, the tenure remaineth as it was before."

Of these statutes, the 2 & 3 Edw. 6, c. 1 (Eng.), dealt with "the celebration of the Lorde's Supper, commonlye called the Masse," as a divine service to continue in use. Neither it nor the

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5 & 6 Edw. 6, c. 1 (Eng.), which substituted the second for the first Prayer Book of Edward 6, altered more than its order and form. Indeed, the second Act recites that doubts, the existence of which is stated to be the reason of the Act, arose in the use and exercise of the common service, "for the fashion and manner of the ministration of the same, rather by the curiosity of the mynistre and mistakers than of any other worthy cause."

These statutes did not in terms declare that the performance of the new service should be accepted as a performance of the old. The view of Parliament was that the Reformed Church was the old Church, with a change in certain of its doctrines, and consequent changes in its liturgy and divine service; that the Communion Service was the Divine Service of pre-Reformation times, altered in such a mode as was incident to the change of doctrine; and Lord Coke's opinion involved this, that the Common Law held that the celebration of the altered service, in the mode prescribed by the altered liturgy, was a performance of a condition which prescribed "making orisons, prayers, Masses, and other divine services for the soules of their grantor," &c. Underlying this doctrine is matter of much moment, for we know as matter of history that the secular clergy of the Reformed Church did not, either in England or in Ireland, lose at the Reformation the lands they held by these tenures. Much land is still held under them by various ecclesiastical foundations in England. Some land was, at and after the passing of the Irish Church Act, held by them in Ireland; and during some of the earlier years of my judicial career, the choir-master and choristers of Christ Church Cathedral were in the habit of coming into the Court of Exchequer once a year, in Hilary Term, and performing there an act of service, under one of these spiritual tenures, by singing a hymn in open Court.

It being then certain that the lands held under these tenures were not forfeited, it is to be asked, How did this happen in England, when each service involved the performance of an act (prayers for the dead) which in that country was declared to be superstitious by 1 Edw. 6, c. 14, and which by that Act forfeited the lands into the hands of the King? *Adams and Lambert's Case* (1).

(1) 4 Rep. 104 (b).

How was it that neither the lands held under such a condition were forfeited, nor the condition itself discharged? The only answer that can be given to that question, and I am satisfied that it is the true one, is that the Common Law, after the Reformation, continued to hold, as I have shown it held in pre-Reformation times, that these tenures involved a general principle of piety which, after the Reformation as well as before, rendered the purposes charitable, and that nothing was affected by the so-called superstition, except the particular mode of performance, for which, either by the statute or by the Common Law (it is immaterial which), the altered service was substituted. This was, to my mind, undoubtedly right, and was analogous to the *cypres* doctrine, shortly afterwards established in Courts of Equity in relation to charities. But if it is right, it establishes that, after the Reformation, the gifts would have remained charitable, were it not that they were illegal. When then, in 1793, all laws prohibiting or discouraging the practice of the Roman Catholic religion were repealed, the illegality determined, and they resumed the character they enjoyed in pre-Reformation times, and once more became charitable—(1) because of their piety; (2) because they were devoted to the support and maintenance of the clergymen, the celebrants.

In the present case, the motive and purpose of the gift are similar to those in frankalmoyne, and are consequently charitable.

To prevent misunderstanding, as to my view of the nature of these gifts, I desire to state that I do not consider that the money is the price of the celebration. In no period of the Christian Church would such a bargain be other than simoniacal. The true nature of the bequest is that of an alms to the clergyman, just as in frankalmoyne the gift was in the nature of alms; but the gift of alms is accompanied by a request for the celebration, and according to our equitable doctrines the clergyman, by accepting that gift, binds himself to fulfil the request. He cannot accept the benefit, and disappoint the expectation. The *honorarium* then is an alms, and a recognized mode of supplementing the income of the clergyman, and is applicable to his support and maintenance; and for this reason alone would be within the very words of the statute of Charles 1.

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For all these reasons, I am of opinion that the narrow view taken in *The Attorney-General* v. *Delaney* (1), that the *only* element of public benefit in the celebration of the Mass is the instruction and edification of the congregation present, fails to appreciate it as a gift to God, as a gift made in the expectation that, because of it, the divine service of a Christian Church, a supreme act of divine worship, would be offered in the name of and by the authority of the whole Church, by ministers specially consecrated to represent her, as an act from which the Common Law knew previous to the Reformation, and therefore knows now, that benefits spiritual and temporal flow to the general body of the faithful—benefits which, even were they spiritual only, would render the service charitable within 10 Car. 1, sess. 3, c. 1. In my mind, if the object of the gift could be separated from its effect (which is impossible), either would render the gift charitable. This certainly is the effect of both combined.

This, then, is my first reason for holding that the decision in *The Attorney-General* v. *Delaney* (1) was wrong, and that the present appeal should be allowed.

I now revert to the effects of the Reformation. It, as I have already said, altered the service; and without entering upon a consideration of the difference between the old and new services, the latter is identified, by the Act of Edw. 6, as being in law the divine service of the Mass, as altered. Each, the old and the new, is an act of divine worship of the Church, an offering of praise, adoration, and thanksgiving, involving a petition for benefits, temporal and spiritual, for all the faithful alive, whether present or absent. All will admit that the divine service of the Reformed Church was, by virtue of its spiritual efficacy, a charitable act, so long as it remained the established church; and if so, having regard to section 20 of the Church Act, which, subject to a power of change, continues all the "doctrines, rites, and ceremonies," notwithstanding disestablishment, so must it have continued thereafter.

Now knowing, as does the Common Law, that the old service contains in substance all of that which renders that new service charitable, together with something else, that old service, at least

(1) I. R. 10 C. L. 104.

since 1869 (when the Roman Catholic and the Reformed Church became equal in the sight of the law), must, too, be charitable, unless those elements which it contains, and which are absent in the new service, prevent the legal result which otherwise would flow from that which is common to both. But such prevention could result only from illegality; and there is now no illegality in the essential differences between the two services. Therefore, because the new service is charitable, so also must be the old. This is my second reason for holding the gift charitable.

There is, however, a third reason, which is of wider application, and which it is therefore right that I should state. The existence of a divine service is essential to all religions; and equally essential is the existence of a privileged class, a priesthood or a class of ministers, by whom that divine service shall be celebrated, on behalf of the Church. The divine service of the particular religion must be defined by the doctrines of its own religion. Without those doctrines it cannot exist as a divine service. Without a knowledge of those doctrines, the spiritual effect of the service cannot be understood. Consequently, the effect of the divine service cannot be known, otherwise than from the doctrines of its religion, coupled with a hypothetical admission of their truth. But the advancement of *any* theistic religion is charitable, and such advancement may result from an increased number of the celebrations of its divine services. Therefore the charitable nature of a divine service must (when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question. The same proposition may be stated in different words. When, in a country like ours at present, where there is no established church, it is alleged that a religion (whose doctrines are not known to the law) is advanced by the performance of an act of divine service, the law, from the fact that it is a divine service, admits that which is involved in its being such an act, viz. that its celebration tends to the advancement of the religion, and, consequently, a gift to procure the performance of the act is charitable. Further, the knowledge that it is a divine service necessarily involves a knowledge of those doctrines but for which it would not exist as a divine service, and therefore renders admissible

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evidence of these doctrines. But when it knows those doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it objectively and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal in the law. It follows that there must be one of two results: either—(1) the law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

The first alternative is an impossible one. The law, by rendering all religions equal in its sight, did not intend to deny that which is the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognize the essence of all religion. The other result must, therefore, necessarily ensue. It must ascertain the spiritual efficacy according to the doctrines of the religion in question; and if, according to those doctrines, that divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable.

These considerations have satisfied me that, in this respect also, the decision in *The Attorney-General* v. *Delaney* (1) was erroneous, and that the celebration of the Mass, whether in private or in public, is charitable; and for this third reason, also, I am of opinion that this appeal should be allowed.

Fitz Gibbon, L.J.:—

The length of time which it has taken to bring the present question to a decision here, and the course of authority upon it, are equally remarkable.

Lord Manners, in 1823, in *Walsh's Case* (2), held a bequest for Masses for the repose of a testator's soul to be valid. But the case was not reported.

(1) I. R. 10 C. L. 104. (2) 7 Ir. Eq. R. 34 n.

Blackburne, M.R., in 1844, in *Read* v. *Hodgens* (1), was put in possession of Lord Manners's decree: holding it to be a decision on the very question, he said that it was his duty to declare a similar bequest to be valid. In his opinion, having given all the time and attention to *Walsh's Case* (2) which it was in his power to command, that case closed all further discussion on that point.

Whether the terms of the bequests in those cases would have raised the present question or not may be doubtful; but certainly no indication was given that the decisions depended in any way upon the presence or absence of a specific direction as to the mode of celebration.

For thirty-two years afterwards we do not know whether such bequests were, for the purposes of taxation, treated as charitable; and their liability to legacy duty was first discussed in 1875 in *Delaney's Case* (3), which decided that a bequest for Masses, which did not contain a direction that the celebration should take place in public, was not "charitable," apparently on the ground that, though the bequest was valid in Ireland, where we never had any Statute of Superstitious Uses, it did not import any "benefit of the public," in the absence of affirmative direction that the Masses should be publicly celebrated.

For brevity, I throughout use "charitable" as importing that element of public benefit which is necessary to bring a gift within the Statute of Pious Uses, 10 Car. 1, sess. 3, cap. 1.

The decision in *Delaney's Case* (3) seems to me to have followed *West* v. *Shuttleworth* (4), in so far as Lord Cottenham put the construction upon the legacies to priests and chapels, that "there was nothing of charity in their object; the intention was not to benefit the priests or to support the chapels, but to secure a supposed benefit to the testatrix herself."

Twenty years have now passed during which *Delaney's Case* (3) has been followed by co-ordinate Courts; but it is now, for the first time, challenged on appeal.

In 1897, in *Hall's Case* (5), the validity and the charitable character of a bequest for Masses expressly directed to be celebrated

(1) 7 Ir. Eq. R. 31.
(2) *Ibid.* 34 n.
(3) I. R. 10 C. L. 104.
(4) 2 My. & K. 698.
(5) [1897] 2 I. R. 426.

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publicly in a specified Roman Catholic Church for the repose of the testator's soul were affirmed by this Court, and were finally established so far as Irish judicial opinion can go.

In *Hall's Case* (1) the direction for public celebration prevented the present question from arising; but I ventured to say that if a Mass was *in itself* necessarily an act of public benefit, I could not see how it became less so because it was directed to be said for the soul of the testator, and I suggested that whether a bequest for Masses was "charitable," as tending to the promotion of religion, must depend, not upon positive law, nor upon the testator's intention, but upon Roman Catholic doctrine, and that if the benefit and edification resulting from the celebration were not, in Roman Catholic belief, confined to the testator, but if the Mass was an official act of public worship, or what Protestants call a "means of grace," believed by the testator and by his Church to carry religious benefit to all the faithful, it could not lose its charitable character, if it was celebrated in any manner authorised by the Church, even though the motive which dictated the gift was primarily, or even exclusively, that of securing a share of that benefit for the testator himself in the next world.

I think myself happy now in following the Lord Chief Baron in his judgment—I do not say in his conversion, for since *Hall's Case* (1) I have needed no conversion.

My excuse for adding anything to such a judgment is that I believe a principle vital to religious liberty and equality, beyond any denominational interest, to be involved in our decision.

What is the essence of a bequest which is held *charitable* because it is *pious* or *religious*? The Statute of Pious Uses specifies gifts—

> "for the erection, maintenance, or support of any college, school, *lecture in divinity*, or in any of the liberal arts or sciences, or for the building, re-edifying, or maintaining in repair of *any Church*, or for the maintenance of *any minister or preacher of the Holy Word of God*"—

which, however differently used, is certainly not denominational—

> "or for *any other like lawful and charitable use and uses warranted by the laws of this realm*."

(1) [1897] 2 I. R. 433, 448, 449.

We have Bacon's authority (1) that money given for the maintenance of a preaching minister, though not a charitable use mentioned in the statute, yet comes within the equity of it for "summa est ratio quae *pro religione* facit."

What is "religion" here? It can not be abstract religion, for no human being can hold that, or even conceive an "abstract idea" of religion. I suppose Pantheism is the nearest approach to it. Religion for the purposes of the Statute of Pious Uses, must be the aggregate of all the lawful forms of religion conscientiously held by the King's subjects, with the practical limitation that each of them must be held by a number of persons sufficient to make that particular form of religion an appreciable component of the religion of the State, and so to entitle those who hold it to take a benefit for themselves as a benefit to *the public*.

Tridentine Dogma, Anglican Doctrine, and the Non-Conformist Conscience, are all phases of the religion of The Holy Catholic Church to which every one who professes the Apostles Creed claims to belong. Not only all these, but also non-Christian religions, and possibly the religion of some Christian sects also, being "warranted by the laws of this realm," must stand equal before the secular Courts in a country like Ireland, where no particular religion is established by law, and no particular faith has ever been declared superstitious by statute. In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the Church or denomination, or body, who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It can have no other guide upon that subject.

The exclusiveness, the vagueness, or the self-sufficiency of principles religiously held by particular creeds, whether they rest on dogma, on doctrine, or on conscience, cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

It would be strange, indeed, if bequests for the promotion of total abstinence, or even vegetarianism; for the maintenance of a place of worship, or of a minister, for a small congregation of peculiar people; for the dissemination of the works of Joanna

(1) Bac. Abr. Charitable Uses, C. 36.

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Southcote; or for the prevention of cruelty to animals, should be held, as they have been, to be charitable objects, if a provision by a Roman Catholic, for Roman Catholics, for the celebration of the Mass, more especially in Ireland, where "Superstitious Uses" are not *mala prohibita*, were to be excluded from the category.

Upon the broad principle that the Mass is the most solemn official act of worship in the Roman Catholic Church; that it can be celebrated by the ordained priests of that Church, and by none others; that ever since 1793 that Church has been legalised as a religious institution in this country; and that it has been proved by legal evidence in this case that, according to the creed of every member of that Church, the Mass, whenever and wherever regularly celebrated in accordance with the law of the Church, results in benefit and edification to all the faithful, I hold that the promotion of that celebration is "charitable" under our Law.

Speaking with all reverence of a faith which I do not hold, touching the very "Mystery of Godliness," I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a Sacrifice a private and exclusive benefit for himself alone, as being much less than blasphemy; and, as I understand the proved doctrine of the Church, it would certainly be heresy. But the hope or belief that, in some shape or form, here or hereafter, a man's good works will follow him—an ingredient of selfishness in that sense—enters into almost every act of charity; and if the act is done in the belief that it will benefit others; for example, in the belief that he that gives to the poor lends to the Lord, it can be none the less charitable because the giver looks for his reward in heaven.

The Lord Chief Baron has shown that the characteristic of charity—in the legal sense—has been attributed to acts of piety to God; his argument from the tenures by Divine Service is most persuasive upon this point; he has shown the recognition of the Mass in pre-Reformation Law, and the effect of the repeal of the Penal Laws in reviving this recognition; he has also endeavoured to identify the Reformed Service with the Mass, so far as their charitable character is concerned. I do not presume to say more on these points than that they all go in aid of the same conclusion

which I wish to keep "in the open," and upon grounds even broader than the treatment of these bequests as an additional endowment for particular clergymen. But it is not immaterial to quote the Irish Toleration Act of 1793. Section 5 repealed the penal laws against the Popish clergy, and section 8 excluded from the benefits of the Act any Popish Ecclesiastic who should exercise any of the rites or ceremonies of the Popish religion, *save within their usual places of worship or in private houses*, thereby legalizing those rites and ceremonies when exercised within those limits. Section 11 expressly mentions the Mass, and repeals so much of the Act 8 Anne, c. 3, as subjects any Papist to fine and imprisonment on his refusal to appear and testify on oath before two Justices of the Peace, "*where and when he heard the Popish Mass celebrated as the same is usual in the Church of Rome.*" This provision seems to me to reduce the question of the lawful and charitable character of any celebration of the Mass to the single question whether it is to be "celebrated as the same is usual in the Church of Rome"? The answer to that question can be obtained only from legal evidence of the laws and usages of the Church of Rome. Here this is supplied by the evidence given in *Delaney's Case* (1), which has been made available in this case, as it was in *Hall's Case* (2).

Taking this evidence, as I did in *Hall's Case* (2), as a paraphrase of the decrees of the Council of Trent, I refer again to the passages in which "*Sacrificium istud vere propitiatorium*" is described as offered "*non solum pro fidelium vivorum peccatis, poenis, satisfactionibus, et aliis necessitatibus, sed et pro defunctis in Christo, nondum ad plenum purgatis, rite juxta Apostolorum traditionem*"—(*Anglice*), "as the same is usual in the Church of Rome"—the very words of the Act of 1793. The same decree commends:—"*Missas illas in quibus solus sacerdos sacramentaliter communicat, partim quod in eis populus spiritualiter communicet, partim vero quod a publico ecclesiæ ministro non pro se tantum, sed pro omnibus fidelibus qui ad corpus Christi pertinent, celebrantur*" (4).

But in the "Catechismus ex decreto Concilii Tridentini ad Parochos" of Pius V., I find an even more conclusive passage—

(1) I. R. 10 C. L. 104.
(2) [1897] 2 I. R. 426.
(3) Sessio XXII. De Sacrificio Missæ, C. ii.
(4) *Ibid.* C. VI.

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"Nulla Missa ex communi usu ecclesiæ celebrata dicenda est privata. Ex quo facile perspicitur, omnes Missas communes censendos esse, ut quæ ad communem omnium fidelium utilitatem et salutem pertineant."

The fruition of faith, "the evidence of things not seen," is hidden from humanity. It is not within the power of any earthly tribunal to entertain the question whether these propositions are true. But it is for us to decide that belief in their truth is part of the faith of the members of the Church which has laid them down; that the Church of Rome is, in Ireland, a lawful religious institution; and that providing the celebration of the Mass for its members promotes their religion by supplying them with what they believe to be a benefit common to them all.

Therefore, a bequest for that object is a charitable gift within the Statute of Pious Uses, as interpreted by nearly a century of judicial decisions.

Holmes, L. J.:—

The question for decision in this case arises on a bequest in the will of Ellen M'Loughlin, by which she directs trustees therein named to pay over the income of certain moneys in their hands, "from time to time, to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of my late husband, my children, and myself."

If this be a bequest for purposes merely charitable, it would not violate the rule against the creation of perpetuities, and would, therefore, be valid; but if the purpose is not charitable, the rule would apply, and the gift must be held bad.

In *The Attorney-General* v. *Hall* (1) it was decided by this Court that a bequest to a Roman Catholic priest to be applied for Masses to be celebrated publicly in a specified Roman Catholic Church in Ireland, for the repose of the testator's soul, is a valid charitable bequest, and exempt from legacy duty under 5 & 6 Vict. c. 82, sect. 38. The only substantial difference between the gift in that case and the gift now under consideration is, that there the Masses were to be celebrated publicly in a specified Roman

(1) [1897] 2 I. R. 436.

Catholic Church; and I am thus relieved, by a decision which I am bound to follow, from the consideration of all other questions save the one—whether the omission of a similar or equivalent direction in Ellen M'Loughlin's will deprives the bequest to the Roman Catholic Primate of the charitable character which would otherwise belong to it. All previous reported cases bearing on the subject were fully considered by Fitz Gibbon, L. J., in *The Attorney-General* v. *Hall* (1), and having carefully read his judgment, I agree in his comments thereon, and the propositions he deduces from them.

Although the conclusion announced by him was confined to gifts for the public celebration of Mass, his reasoning seems to me to be equally applicable to cases where the celebration might be, or is directed to be, in private, and that he was conscious of this himself is shown by his final declaration that he is not willing to limit the foundation of his judgment by accepting the decision in *The Attorney-General* v. *Delaney* (2). Still, whatever may be the view entertained by individual Judges, *Delaney's Case* (2) has hitherto been accepted as an authority, that a bequest for the celebration of Masses for a departed soul given in general terms, and without specifying whether such celebration was to be in public or in private, is not for a charitable purpose. Fitz Gibbon, L.J., says, in *Hall's Case* (1), that previous to *The Attorney-General* v. *Delaney* (2) there is no reason to suppose that any difference was made between public and private celebrations.

Now, there is one point to which little attention seems to have been paid in *Delaney's Case* (2). The evidence is that Mass for a departed soul may be said in private, but in practice generally, and in Ireland almost universally, it is said in a public church.

The Lord Chief Baron deals with this in *Delaney's Case* (2) in the following words:—"In the present case there is not, on the face of the will—nor, indeed, at all—an obligation that the Masses shall be celebrated in any specified public congregation in Ireland, or in public at all. The practice is that Masses said in pursuance of obligations imposed by such bequests are usually celebrated in public. The question is not whether the money may be applied

(1) [1897] 2 I. R. 426, 442. (2) I. R. 10 C. L. 104.

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to purposes strictly charitable, but whether the legatee is *bound* so to apply it: *Morice* v. *Bishop of Durham* (1). This cannot be effected by a usual or even by a universal practice."

The case of *Morice* v. *Bishop of Durham* (1), where the language was so vague and general as to cover any benevolent or generous application of the bequest, does not touch my difficulty. Speaking with great deference, I am disposed to think that the passages read during the argument from the Missal or Mass-book show that the Mass is primarily, if not essentially, a public rite, although it may also be said in private; and I am satisfied by the evidence of Dr. Delaney that the normal mode in Ireland of celebrating Masses for departed souls is in a church open to the public. If this be so, there is no reason satisfactory to my mind against holding that such a bequest as we are now considering refers to Masses celebrated in the usual way.

I am unwilling, however, to make this the only ground of my judgment; and I now propose to deal with the gift on the assumption that it directs in express terms that the Masses may be said either in public or in private.

On what ground is it argued that the bequest in *The Attorney-General* v. *Hall* (2) is charitable, while that in *The Attorney-General* v. *Delaney* (3) is not? In the last-named case the Lord Chief Baron, in answering the argument that as the Mass, even where celebrated in private, is, according to the Roman Catholic doctrine, for the benefit of all the faithful, and therefore charitable, says—"In my opinion this is not so. To constitute a charitable use in analogy to the Statute of Elizabeth the purpose must be one which the Court itself can ascertain, and declare to be public or beneficial to the public. It cannot, in my opinion, derive the element of public benefit from the efficacy, spiritual or temporal, which, according to the faith of the testator, the religious act may possess." This puts very neatly the argument on one side. I shall now read in connexion with it the words of Fitz Gibbon, L.J., in *Hall's Case* (2):—"I cannot conceive it to be the proper exercise of the jurisdiction of a temporal Court in a country professing to be governed upon principles of absolute religious equality to discuss religious doctrines.

(1) 9 Ves. 399; 10 Ves. 541. (2) [1897] 2 I. R. 448. (3) I. R. 10 C. L. 104.

Nor can I conceive it possible that the liability to duty of a legacy for the benefit of a public minister of religion can in law depend upon considering the efficacy of his ministrations, or whether or how far benefits, which are conscientiously believed by the members of his own denomination to flow from prescribed ceremonies, are really attainable. . . . It is enough to say that where, according to the religious belief of a body of persons recognized as part of the public, an act of religion done by a public minister of their Church is for the spiritual advantage of them all, a bequest for the benefit of a minister of religion to perform that act, must be deemed charitable."

It will be observed that the difference in the propositions laid down in the two passages I have quoted is, that in one it is stated that the Court cannot derive the element of public benefit from the efficacy, spiritual or temporal, which, according to the faith of the testator, the religious act may possess, but must ascertain the existence of such benefit by independent investigation; while in the second passage the belief of the testator and of the Church to which he belongs is made the only test. This difference may be further illustrated by reference to the judgment of Andrews, J., in *Hall's Case* (1). He says that "the Court cannot determine that the celebration of the Mass in private confers a public benefit, although according to the faith of the Roman Catholic Church it may, and according to the belief of that Church it does, confer such benefit."

But in the sentence immediately preceding he says—"A Court can, and according to the authorities ought, in my opinion, to determine that the public celebration of the Mass confers a public benefit by the religious edification of those members of the Roman Catholic Church who attend it." I am wholly at a loss to know now, if the Court cannot determine whether the celebration of a private Mass carries with it public benefits, by what means it can determine that a Mass said in public confers such benefits. The reason it cannot determine the first-mentioned point is, because it is not a proper exercise of the jurisdiction of the temporal courts of a country where all religions are in law on an equality to discuss and determine the truth of religious doctrine. But the determi-

(1) [1897] 2 I. R. 426.

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nation of the second point would equally involve the consideration by the Court of the truth of a religious doctrine. If I were obliged to arrive at a judicial conclusion as to whether the public celebration of the Mass confers a public benefit on those who hear it, I must consider the doctrine that is embodied in this rite. I might adopt the declarations of the Council of Trent regarding the sacrifice of the Mass, or I might adopt the strong language of the 31st Article of Religion in the English Book of Common Prayer. In the one case it would necessarily follow that the celebration, whether in public or private, would confer a public benefit; in the other case it would just as necessarily follow that no such benefit is possible. No Court of Justice in this country can be called on to decide such a question as this. What we can determine with certainty is, that it is part of the creed of the most ancient Church in western Christendom, of which the testatrix was a member, that the Mass is a true sacrifice offered to God by the priest in the name of the Church whose minister he is; that every Mass, whether public or private, is believed to bring Divine blessings to the world; and that all the faithful, present or absent, alive or dead, participate in those blessings. Now, if this be true, there can, I think, be no doubt that a bequest for the purpose of having private Masses celebrated would be charitable, and a temporal Court in Ireland, having no authority to decide for itself whether it is true or not, must take as its guide the belief of the Church of which the testatrix is a member. I understand this to be the law, and on this ground I concur in holding that the appeal ought to be allowed.

Solicitor for the plaintiff: *E. O'Hagan.*
Solicitor for the defendant: *W. Gallagher.*
Solicitor representing the heir-at-law: *Sir Augustine Baker.*

R.D.M.

IN RE THE POSTMASTER-GENERAL AND COLGAN'S CONTRACT.

Barton, J.
1906.
Jan. 19, 20, 27.
Feb. 14.

(1905. No. 1123.)

Vendor and purchaser—Contract for sale of freehold premises—Vacant possession—Non-completion on appointed day—Interest on purchase-money—"Wilful default" of vendors.

By agreement, for the sale of certain freehold premises to the Postmaster-General, it was provided that the purchase should be completed on the 1st August, 1904; that on completion the purchaser should be given clear possession; that the purchaser should pay the purchase-money on that date; and that if, from any cause other than the wilful default of the vendors, the purchase should not be completed on or before that date, the purchaser should pay interest on the purchase-money. The vendors were in a position, shortly after 1st August, 1904, to give vacant possession of all the premises, save one holding, which they had assumed to have been held under a quarterly tenancy. On that assumption they had served a three months' notice to quit for August 1st; but in ejectment proceedings it was held that the tenancy was a yearly one, commencing on May 1st, and that therefore the notice was insufficient. The premises consisted of a licensed publichouse, which had been held for more than thirty years at an annual rent, payable quarterly. The tenancy had commenced on May 1st, 1871, but the vendors had no record or recollection of the exact terms of the letting. As a result, the vendors were not in a position to complete until 29th June, 1905:—

Held, that, in assuming the tenancy to be quarterly, and in fixing the date for completion on that assumption, the vendors had been guilty of wilful default, and that therefore they were not entitled to be paid interest on the purchase-money.

SUMMONS.

Application by the vendors, under the Vendor and Purchaser Act, 1874, for an order that, under the provisions of the contract for sale, they were entitled to be paid by the purchaser interest at the rate of £5 per cent. per annum, from 1st August, 1904, to 29th June, 1905, on the sum of £11,500, being the purchase-money of the premises the subject-matter of the contract. The contract, which was dated 27th January, 1904, was for the

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sale of certain parcels of freehold land in the city of Belfast, and was made between His Majesty's Postmaster-General, the purchaser, of the one part, and Eliza Colgan and others, the vendors, of the other part. The contract provided that the purchaser should, on completion of the purchase, be given clear possession of the premises as from the 1st day of August, 1904, up to which date all rates, taxes, and outgoings were to be paid by the vendors, and, if necessary, the rents, profits, and outgoings were to be apportioned. Paragraph 2 of the contract, on which the question at issue between the parties arose, was as follows:—

"The purchaser shall pay the said purchase-money to the vendors, or, as they shall direct, on the 1st day of August (1904) next, at the office of the solicitor to the Post Office, Sackville-street, Dublin, at which time and place the purchase shall be completed. If, from any cause whatsoever other than the wilful default of the vendors, the purchase shall not be completed on or before the 1st day of August (1904) next, the purchaser shall pay to the vendors interest on the purchase-money at the rate of five pounds per cent. per annum from that day until the completion of the purchase."

In an affidavit of Mr. Louis A. Meenan, solicitor for the vendors, in support of the application, he stated that the agreement was signed on behalf of the purchaser on the 10th December, 1903; but before being signed by those of the vendors who were resident in this country, it had to be sent to Australia for signature there, and he considered it necessary to obtain that signature before serving notices to quit upon the tenants. The Australian signature was obtained on 27th January, 1904, and he was informed of this by cablegram received on 6th February, 1904. There were thirty-nine tenants in occupation of the premises, a number of whom were weekly tenants. All the others paid their rents quarterly, and were believed to be quarterly tenants. When the cablegram was received, it was too late to serve notices to determine the quarterly tenancies on 1st May, 1904, and notices were served to determine the tenancies on 1st August, 1904, on which date the entire premises were vacated with the exception of No. 13, Smithfield, held by Mrs. Elizabeth Crothers, a licensed publican. The tenancy of Mrs. Crothers appeared to have been created in May,

1871, by the then agent, Mr. M'Auliffe. The present agent, Mr. William M'Cormick, who had previously been principal clerk of Mr. M'Auliffe, was appointed agent about the end of 1871, but he had no recollection of the terms of the letting, and there was no entry in the books as to the terms of the letting. The rent had always been paid quarterly. Mrs. Crothers refused to give up possession on 1st August, 1904, but at that time she raised no question as to the sufficiency of the notice to quit. Ejectment proceedings were commenced in the Belfast Recorder's Court, and when the case came on for hearing, on 30th September, 1904, it was contended on behalf of Mrs. Crothers that the letting was not quarterly. The case was adjourned, and on 21st November the Recorder of Belfast decided that the letting was a yearly one, and that consequently the notice to quit was insufficient. In the meantime a new notice to quit was served on the 28th October, 1904, for the determination of the tenancy on 1st May, 1905. On 2nd May, 1905, a writ of summons claiming possession of the premises was issued. On or about the 14th June, 1905, when the action was ripe for trial, the defendant, Mrs. Crothers, signed a consent for judgment for possession, and on 20th June, 1905, possession was given over to the vendors. On 29th June possession was handed over to the purchaser, and on the same date the purchase-money was paid. In his affidavit, Mr. Meenan also stated that the vendors had no means of ascertaining exactly the nature of the tenancy of Mrs. Crothers; that they believed it was a quarterly one; that nothing had occurred to lead them to think that the interest of Mrs. Crothers was greater than that of any other of the tenants; and that they had entered into the contract in the belief that the tenancy was quarterly. In a second affidavit, Mr. Meenan made an exhibit of the rental of the property from 1st May to 1st November, 1897, in which Mrs. Crothers' annual rent was returned as payable quarterly. Mr. William M'Cormick, agent for the property, stated in an affidavit that before the contract was entered into he was applied to by the vendors for particulars of the tenancies, and that he had informed them that in his opinion Mrs. Crothers' tenancy was quarterly. Mr. E. R. Bate, solicitor, made an affidavit on behalf of the purchaser, in which he stated that for some time previous to October, 1893, correspon-

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dence had been going on between the vendors and the purchaser, and on 20th November, 1903, he, on behalf of the purchaser, asked Mr. Meenan if the premises were in hand, and if the vendors were in a position to give over vacant possession when they came to close. Again, on the 23rd November, he asked if the vendors would agree to 1st August, 1904, as the day for closing the transaction, and if they would be in a position to give vacant possession on that date. On 24th November, 1903, Mr. Meenan wrote that he had advised the trustees to accept the 1st August, as the date for completion. He added:—"With regard to giving you vacant possession, I cannot agree to this. . . . Some of the tenancies are yearly, but the bulk of them are six months, quarterly, and weekly tenancies. Whenever the contract of sale is signed, under your instructions, I shall notice the tenants, and do all I can to have them vacant when the purchase is closed." In his reply, dated 25th November, 1903, Mr. Bate wrote:—"I doubt if the Post Office authorities will agree to 1st August, 1904, as an absolute date for closing. Can you name a date on which you will be able to give vacant possession? What is the date on which the yearly tenancy, with the latest date of commencement, can be terminated?" On 27th November Mr. Meenan wrote:—"I cannot just at present name a date to give you vacant possession." On 28th November, Mr. Bate wrote:—"I await your further communication as to the date on which you expect to be able to give vacant possession." On 4th December, 1903, Mr. Meenan wrote:—"With regard to giving you vacant possession, I think we shall be able to do so on completion," and on 8th December, 1903, he wrote that he had inserted "1st August, 1904," in the agreement. On 11th December, 1903, Mr. Bate wrote:—"As the agreement has been signed by the purchaser, you will, no doubt, forthwith proceed to terminate all tenancies with a view to giving vacant possession on 1st August, 1904." The vendors' solicitor did not serve notices to quit until 28th April, 1904, when it was too late to secure the possession of the holding of Mrs. Crothers on 1st August, 1904. On 5th August, 1904, Mr. Meenan wrote that there were still two or three tenants in possession, so that even if Mrs. Crothers had been dispossessed, the vendors could not have fulfilled their contract on 1st August.

Matheson, K.C., and *M'Ilroy*, for the vendors:—

There may have been a mistake, but, if so, it was a *bona fide* mistake as to the nature of the tenancy, and that was not wilful default within the authorities. The vendors had exhausted all available sources of information, and were justified in acting on their agent's information, that the tenancy was no greater than any of the other tenancies, namely, a tenancy from quarter to quarter: *Sherwin* v. *Shakspear* (1); *Elliott* v. *Turner* (2); *Williams* v. *Glenton* (3); *In re Young & Harston's Contract* (4); *Lewis* v. *Great Western Railway Co.* (5); *In re Mayor of London & Tubbs' Contract* (6); *In re Woods & Lewis' Contract* (7); *North* v. *Percival* (8); *Bennett* v. *Stone* (9). There was no conclusive presumption from the payment of rent as to the nature of the tenancy—it is a question of fact in every case. Foa on Landlord and Tenant, 3rd ed. 3, 554.

Samuels, K.C., and *Cecil Atkinson*, for the Postmaster-General:—

The vendors knew the material facts—that there were tenancies which were yearly tenancies—and that there were difficulties to be overcome. They were asked to select and did select their own date for completion. It was their duty to overcome these difficulties by that time. Their attention was particularly called to the difficulty which might arise. No fresh unforeseen occurrence prevented completion; and thus their default was wilful, although it may not have been actually intentional. Under such circumstances it would be wilful default even if it arose merely from an erroneous conclusion on the part of the vendors on a question of law: *Young & Harston's Contract* (4); *In re Hetling & Merton's Contract* (10); *Pelly & Jacob's Contract* (11). An omission to do that which is necessary to enable the vendor to carry out the contract is wilful default: *In re Wilson & Stevens' Contract* (12);

(1) 5 D. M. & G. 517.
(2) 13 Sim. 477.
(3) 1 Ch. 206.
(4) 31 Ch. D. 168, at p. 174.
(5) 3 Q. B. D. 195, at p. 206.
(6) [1894] 2 Ch. 524.
(7) [1898] 1 Ch. 433; [1898] 2 Ch. [211.
(8) *Ibid.* 135.
(9) [1902] 1 Ch. 226; [1903] 1 Ch. [509.
(10) [1893] 3 Ch. 269.
(11) 80 L. T. 45.
(12) [1894] 3 Ch. 546.

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Bennett v. *Stone* (1). The vendors were not entitled to assume that the tenure of Mrs. Crothers was a quarterly tenancy; and if they made a mistake as to the time of terminating it, the purchaser who stipulated for clear possession should not be muleted in interest to make good the vendors' default.

M'Ilroy, in reply.

Feb. 14.

Barton, J.:—

The question for decision is whether the purchaser is liable to pay interest from 1st August, 1904, the date fixed for completion in the contract, to 29th June, 1905, the date of actual completion; or whether he is relieved from such liability by reason of the delay in completion having been caused by the wilful default of the vendor.

The purchaser is the Postmaster-General, who required the ground in question for the purpose of building an extension to the Belfast Post Office premises. For that purpose vacant possession was essential; and this was made clear by the purchaser in the correspondence from the start. The premises were occupied by between thirty and forty tenants. It would be necessary to get up or recover possession from them before clear possession could be given. The time which this operation would take would depend upon the tenure of the tenants. All this was present to the mind of Mr. Meenan, who was one of the vendors, and being a solicitor, acted for himself and for the others. With all this present to his mind he exercised his will and judgment by agreeing to complete on August 1st, 1904, and to give clear possession on completion. This, I think, is the fair inference from the correspondence consisting of the eight letters which passed between the parties between November 20th and December 4th, 1903, after which the contract was signed by the purchaser on December 10th.

By the agreement vacant possession was to be given on completion, and the purchaser left it to the vendor to fill in the date, as he alone could know the time that would be reasonable.

(1) [1903] 1 Ch. 509.

On November 24th the vendor wrote that he was unwilling to agree to give vacant possession on completion, and mentioned that some of the tenancies were yearly, but the bulk six months, quarterly, and weekly. In letters of the 25th and 28th November the solicitor for the Post Office wrote that they would insist on getting vacant possession on completion, and in the letter of the 25th he pointed out to the vendor the obvious guide to fixing the date. He wrote—"What is the date on which the yearly tenancy, with the latest date of commencement, can be terminated?" On the 27th the vendor wrote that he was looking into the matter. On the 8th of December, after looking into the matter and having his attention drawn to the very point which caused the subsequent delay, he wrote that he had filled in the 1st August as the date of completion, and that he thought he would be able to give vacant possession on that date. It appears that on looking into the matter he had come to the conclusion that none of the tenancies were more than quarterly tenancies, or at all events that they might be treated as such. There was some necessary delay in getting a signature to the contract in Australia. Notices to quit were served for August 1st. All the tenants, save one, gave up possession on or before August 16th; and I hardly think that any serious complaint is made of that delay of sixteen days. But a Mrs. Crothers, who had a valuable licensed house, claimed to be a yearly tenant, and the Recorder of Belfast held that she was so. As her tenancy commenced on May 1st, notice to quit had to be served for that date, and it was impossible, and had been from the start impossible, to get possession before the end of June, 1905, a delay of more than ten months. I hardly think that it has been seriously contended that the purchaser was bound to complete until the vendor was ready to give vacant possession. In his letter of August 5th, a few days after the day fixed for completion, the vendor wrote—"I cannot, as yet, give you any indication as to the date on which we will be ready to close; the tenants are nearly all out with the exception of two or three." This shows that the vendor recognized that there could be no completion until he was ready to give vacant possession. On the other hand, the contract assumed that there might be delay in completion, and

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provided for apportionment of profits (which were nil) and outgoings from August 1st. The purchaser was to be liable for interest unless delay should be caused by the wilful default of the vendor.

There can be no doubt that the reason why the contract was not completed on August 1st, 1904, was that the vendor fixed an impossible date, having regard to the fact that one at least of the tenancies was a yearly tenancy. Allowing for the necessary time to get a signature in Australia, it was impossible to serve a three months' notice for May 1st, 1904, much less a six months' notice. The default of the vendor, if any, was in assuming that this tenancy was a quarterly tenancy, and in fixing the date on that assumption. Was that a default within the meaning of the contract? If so, was it wilful default? These are the questions for decision.

The words "default" and "wilful" are relative terms. Each case must depend upon its own circumstances. A concise summary of their meaning is given by Stirling, L.J., in *Bennett* v. *Stone* (1): "According to the rule laid down in *Young & Harston's Contract* (2), a vendor commits a default if he fails to do something which he ought reasonably to do, regard being had to the terms of the contract which he has entered into with the purchaser, and is guilty of wilful default if he so fails when he is a free agent and knows what he is doing and intends to do what he does." To this may be added as an obvious corollary—that an honest mistake, the result of oversight or inadvertence, is not wilful unless persisted in after the attention of the vendor has been called to it. Mere oversight or inadvertence cannot amount to wilful default. The vendor must have his attention drawn to the matter in question, and exercise his judgment or will on it before his act or default can be considered wilful. In the present case it will be found, I think, that the difficulty is not so much upon the word "wilful" as upon the word "default." The vendor clearly had his attention called to this very point, namely, whether the tenancies or any of them were yearly, and to the proper precaution to be taken, namely, to ascertain the yearly tenancy with the latest date of

(1) [1903] 1 Ch. 509, 519. (2) 31 Ch. D. 168.

commencement. But the vendors' counsel have argued that the vendor was right in assuming that this was a quarterly tenancy; that the decision of the Recorder, which was appealable and was not appealed from, that it was a yearly tenancy, was wrong; or at all events that the vendor did not fail to do anything he ought reasonably to have done in assuming that this tenancy was quarterly, not yearly. In considering whether the vendor failed to do what he ought reasonably to have done, I think we should inquire what were the facts before the vendor and subsequently before the Recorder, because the vendor had all the facts before him that were afterwards before the Recorder.

The facts which the vendor must be taken to have had before him when he looked into the matter with his attention called to it were these. Mrs. Crothers was tenant of a licensed publichouse. Neither the owner nor the agent knew what were the terms agreed upon between her and the owner when the tenancy commenced. It appeared by the rentbook and accounts that the tenancy commenced upon the 1st May, 1871, and that she paid a yearly rent, payable quarterly. The subject-matter of the tenancy was or had become a licensed house. The tenancy had existed uninterruptedly for more than thirty years. From these facts I think it was a rash assumption to assume that any Court would hold the tenancy to be a quarterly one—I may refer to two old cases in which the proper inference from bare facts such as these was considered, namely, *Richardson* v. *Langridge* (1); and *Doe* d. *Hull* v. *Wood* (2).

In *Richardson* v. *Langridge* (1) there was an agreement to let premises for as long a time as the parties should respectively please. The Court held that this did not amount to a tenancy from year to year. Mansfield, C.J., said, at p. 131—"*If there were a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year*"; and Chambre, J., at p. 132, said—"Surely the distinction has been a thousand times taken; a mere general letting is a letting at will: *if the lessor accepts yearly rent, or rent measured by any aliquot part of a year,*

(1) 4 Taunt. 128, 131, 132. (2) 14 M. & W. 682, 687.

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the Courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. *The Courts have a great inclination to make every tenancy a holding from year to year*, if they can find any foundation for it, but in this case there is none such." In *Doe* d. *Hull* v. *Wood* (1), Parke, B., at the end of his judgment (p. 687), said—"*Richardson* v. *Langridge* (2) correctly lays down the law on the subject, viz., that a simple permission to occupy creates a tenancy at will, *unless there are circumstances to show an intention to create a tenancy from year to year; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of a year.*"

Holding as I do that the vendor must be taken to have known the material facts governing the tenancy of Mrs. Crothers, I think it was unreasonable for him, having regard to the mutual relation of the parties under the contract, to assume that this was a quarterly tenancy, and to fix a day which, if the tenancy were held to be a yearly one, must impose a liability for at least nine or ten months' interest upon the purchaser.

In my opinion the case stands in principle upon the same basis as *Hetling & Merton's Contract* (3). In that case the vendor agreed to complete on a certain date. The property was subject to a mortgage to two trustees whose concurrence would be necessary. One of them had gone abroad, leaving a general power of attorney with his partner to execute deeds and transfers of any property held by him as trustee or mortgagor. The vendor knew of this, and that the absent trustee's concurrence would be necessary; but he relied for that purpose upon the general power of attorney left with the absent trustee's partner. The purchaser objected, and required a conveyance from the absent trustee, which caused the delay in question. The question of the sufficiency of the general power of attorney was afterwards argued both before Kekewich, J., and the Court of Appeal. But they held that it was insufficient, and that the vendor had been guilty of wilful default in assuming that it was sufficient. In that case, as in the present case, the vendor's assumption was an honest mistake; but it was not a mere oversight or inadvertence. Lindley, L.J., said (p. 281):—

(1) 14 M. & W. 682. (2) 4 Taunt. 128. (3) [1893] 3 Ch. 269.

"If a vendor knows the material facts—knows that there are difficulties which it is his duty to overcome—knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time, although no fresh unforeseen occurrence prevents him from doing so, the delay caused by such failure on his part is attributable to his wilful default in the sense in which that expression is used in contracts of this description; and his right to interest during such delay is excluded. The vendors here knew all the facts, but they hoped that the power of attorney would enable them to remove the difficulty occasioned by the facts with which they were fully acquainted."

Now, turning to the present case, does not that passage in Lindley, L.J.'s, judgment apply to the facts of this case? In the present case the vendor knew that there were difficulties which he had to overcome in order to be in a position to complete—namely, to get up clear possession. There was present to his mind the question whether the tenants were yearly or quarterly or weekly. The purchaser called his attention directly to the point which should guide him in fixing a date—namely, the latest date of commencement of any yearly tenancy. With the knowledge of the difficulty to be overcome, and with his attention directly called to the obvious way of overcoming it, he chose to assume that the tenancy of Mrs. Crothers was a quarterly tenancy. He looked into the facts which were all at his hand, and he hoped by serving quarterly notices to get rid of the difficulty occasioned by these facts. This hope proved fallacious. The only unforeseen occurrence was the decision of the Recorder that the tenancy was a yearly one, but that was no more unforeseen than the decision of the Courts in *Hetling & Merton's Contract* (1) that the general power of attorney was insufficient for the purpose for which the vendor in that case had assumed it was sufficient. In my opinion there was default on the part of the vendor in this case, and the default was wilful within the meaning assigned to these words by the authorities.

It was suggested that the default in this case ought to be

(1) [1893] 3 Ch. 269.

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regarded as an honest mistake or oversight within the meaning of the decision in *Mayor of London & Tubbs' Contract* (1); but Lindley, L.J., in that case did not intend to depart from his judgment in *Hetling & Merton's Contract* (2). On the contrary, he referred to it as a binding authority. In *Tubbs' Contract* (1) the vendor's attention was never brought to the difficulty which arose. The point never occurred to him. Far from looking into it, he overlooked it altogether. It was a mistake of mere oversight and inadvertence. Such a mistake is not wilful. It is quite different where, as here, the point was directly present to the vendor's mind, and his attention was drawn to the difficulty to be overcome, and to the proper way of overcoming it.

As regards *Bennett* v. *Stone* (3), which was a different kind of case from the present one, Vaughan Williams, L.J., and Stirling, L.J., thought there was wilful default in that case. I may refer to what Vaughan Williams, L.J., said at p. 515, and to Stirling, L.J.'s, judgment at p. 519. On the other hand, Buckley, J., and Cozens Hardy, L.J., thought there was no wilful default. Cozens Hardy, L.J., spoke of the default in that case as a mere honest mistake, under advice of counsel, as to the form of the conveyance, a very different kind of default from that which is alleged in the present case. Here the vendor fixed an unreasonable and impossible time for completion, with his attention called to the difficulty which might cause delay, with the material facts before him, and with the proper course carefully pointed out to him by the purchaser.

The reason of these clauses obliging the purchaser to pay interest if he does not complete on a particular day, was explained by Lindley, L.J., in *In re Woods & Lewis's Contract* (4), at p. 213, namely, to protect the vendor from dilatoriness on the part of the purchaser. Lindley, L.J., proceeded to explain the reason of inserting in such clauses words such as we have here, "from any cause other than the wilful default of the vendor." What he said bears directly on the present case. "The vendor knows whether he is fixing a day for completion which is a reasonable time, having regard to the difficulties which he knows he has to

(1) [1894] 2 Ch. 524.
(2) [1893] 3 Ch. 269.
(3) [1902] 1 Ch. 226; [1903] 1 Ch. 509.
(4) [1898] 2 Ch. 211, 213.

deal with; and if there were not some limit put upon these clauses, either by construction or by the wording of them, to prevent vendors taking advantage of their own wrong, these clauses would be very oppressive."

That passage seems to me to fit this case very well. It was left to the vendor to fix the day for completion. He knew the difficulties he had to deal with. He knew the material facts. He knew the point which should guide him in fixing a day. His attention was directed to all these matters, and he looked into and considered them. He fixed a date which was an impossible one, unless a tenant of valuable licensed premises, held under a yearly tenancy, consented to go out without a protest upon a notice applicable only to a quarterly tenancy. Was the vendor entitled to assume that the tenancy was quarterly, or that the tenant would relinquish her valuable interest without relying on her legal rights? I think any such assumption was rash and hazardous; and that to charge the purchaser with interest for the consequential delay would be to defeat the object of this exception as to wilful default.

Solicitor for the vendors: *Louis A. Meenan.*
Solicitor for the purchaser: *Thomas R. Bailie-Gage.*

W. M'G.

Land Com. 1906.

Feb. 2. March 6.

IN THE MATTER OF THE ESTATE OF ABRAHAM J. HOWLIN (1).

Land Purchase Acts—Irish Land Act, 1903, *sect.* 48, *sub-sect.* 4—*Undivided moiety of estate insolvent; life estate of vendor in other undivided moiety insolvent, but remainder expectant thereon solvent—Bonus.*

Where, in the case of an estate sold under the provisions of the Irish Land Act, 1903, it appeared that one undivided moiety, to which the vendor was absolutely entitled, was insolvent, and that the life estate of the vendor in the other undivided moiety was insolvent, but that the remainder expectant on the determination of the vendor's life estate in the latter was solvent, on a question arising as to whether the bonus was payable under the provisions of sect. 48:

Held, that the case did not come within the provisions of sub-section 4 of section 48, and, accordingly, that the bonus was payable.

APPLICATION for an order declaring that percentage mentioned in section 48 of the Irish Land Act, 1903, was payable in respect of the estate sold in this matter.

John Howlin, the predecessor in title of the vendor, died in 1857, having by his will, which was duly proved, devised all his property, which included, *inter alia*, the lands sold in this matter, to his son, the vendor, and to his daughter Diana Maria Howlin, share and share alike, subject to certain conditions which, so far as were material, were that in the event of the said Diana Maria Howlin dying without issue or unmarried, the moiety so devised to her should go over to the vendor.

By indenture of marriage settlement, dated February 11th, 1862, and made on the occasion of the marriage of the vendor with Mary Howlin, the vendor granted his undivided moiety in the said lands to Crosbie W. Harvey and Edward Lloyd, the trustees therein named, and their heirs, to hold after the solemnization of the said marriage to the use of the vendor and his assigns during his life, with remainder to the said Mary Howlin and the issue of the marriage, as by the said indenture provided, with ultimate

(1) Before Ross, J., sitting as a Judicial Commissioner.

remainder to the vendor in fee-simple. The said Diana Maria Denny, otherwise Howlin, died on May 11th, 1901, without issue. In 1902, a petition was presented for the sale of the said lands, and on February 10th, 1902, an order for sale was made thereon. On March 28th, 1902, an order was made in the Land Judge's matter declaring that the estate of the said Diana Maria Denny, otherwise Howlin, had determined, and that the gift over to the vendor had taken effect. On July 13th, 1903, an order was made staying the proceedings for sale in the Land Judge's Court, in order to enable the vendor to negotiate with the tenants with a view to a sale to them under the Land Purchase Acts. The sale to the tenants was subsequently carried out by the vendor under the provisions of the Irish Land Act, 1903. At the time of sale the vendor was not entitled to receive for his own use any part of the rents and profits of the said lands. After discharging the incumbrances affecting the entire fee out of the purchase-money, the residue available was insufficient to discharge the incumbrances affecting the undivided moiety to which the vendor was absolutely entitled, and his life estate in the other undivided moiety. It appeared, however, that the remainder expectant on the determination of the life estate of the vendor in the latter moiety was solvent, and that there would be a surplus for the trustees.

On March 5th, 1905, an order was made by the Land Judge dismissing the petition in respect of the lands sold in this matter.

W. M. Jellett, K.C., for the vendor:—

This case does not come within the first excepting clause in sect. 48 (4), as the estate has not been sold by the Land Judge. It does not come within the second excepting clause, as the estate was not so circumstanced that it would, independently of the Act of 1896, have been sold without the consent of the owner as to price: *Grogan's Estate* (1). The owners of the remainder in the settled moiety, which is solvent as to capital, would have been consulted. The bonus is payable in respect of the entire estate, and must be paid irrespective of the fact that one undivided moiety

(1) [1896] 1 I. R. 614.

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is absolutely insolvent: *Minhear's Estate* (1). Even supposing that the estate was so circumstanced that it could, independently of the Act of 1896, have been sold without the consent of the owner as to price, there was no absolute order for sale *in force* at the date of the passing of the Act of 1903, as a stay had been put on it. An order *in force* at the crucial date means an order under which something can be done.

The Right Hon. J. H. Campbell, K.C., and *E. Coll*, for the Treasury:—

This estate was so circumstanced that it could have been sold without the consent of the owner, within the meaning of the second excepting clause in section 48 (4). The word "owner" there has a different meaning from what it has in the Land Judge's Court. As the sale took place in the Land Commission, the only owner who could be considered was the owner of the insolvent moiety and of the insolvent life estate. It was he who set the Act in motion, and what the Court has to look to is the condition of the owner for the purpose of the Act that is being administered. The object of sub-sect. 4 was to take away the inducement for putting the Act into motion from persons who were owners within the meaning of the Act, but who had no beneficial interest in the property: *Minhear's Estate* (1) does not apply. With regard to the words *in force* in the second excepting clause in sub-sect. 4, the true test is, was the property at the crucial date covered by an absolute order for sale? If a receiver had been appointed, he would not have been discharged by the order staying the proceedings.

March 6.

Ross, J.:—

This is an application for an order declaring that the bonus is payable to the vendor, or is to be added to the purchase-money. The facts are shortly these.

One moiety of the estate is the absolute property of the owner, Abraham Howlin, and is insolvent. The other moiety is in settlement. The same owner has a life estate in the settled lands, and

(1) 38 Ir. L. T. R. 214.

the life estate is insolvent. The remainder expectant on the determination of the life estate is solvent. The whole estate comprising these two moieties has been sold to discharge incumbrances affecting the fee. Though an absolute order was made for the sale of the whole estate, a stay was put upon the proceedings by an order made by the Land Judge on the 13th July, 1903.

It is contended on behalf of the Crown that no bonus is payable, having regard to the provisions of sub-sect. 4 of sect. 48 of the Act of 1903.

The earlier part of the section lays down a general rule directing payment of a bonus for the purpose of aiding the sale of estates. The bonus is payable unless the case is brought strictly within the provisions of sub-sect. 4. The case does not come within the first exception—the estate has not been sold by the Land Judge. The next exception applies in cases where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, and where an absolute order for sale by the Land Judge was in force at the date of the passing of the Act of 1903.

It has been contended by the owner that the absolute order for sale was not in force after the stay had been put upon it. The words "in force" mean, I think, nothing more than that there was an existing order unrescinded. It might be made effective by a simple order removing the stay.

The Crown further contend that this is an estate so circumstanced that it would be sold without the consent of the owner.

The decision in *Grogan's Estate* (1) must be taken as adopted by the Legislature in the Act of 1903. An estate that would be sold without the consent of the owner, therefore, means a wholly insolvent estate. Mr. Justice Meredith decided in *Minhear's Estate* (2) that, where the estate sold in the Land Judge's Court is partly solvent and partly insolvent, the case does not come under the saving clause, and, therefore, the bonus must be paid in conformity with the general rule. Although the Treasury were not represented in the argument, I think the decision binding; and I respectfully approve of the reasoning of the learned Judge.

(1) [1896] 1 I. R. 614. (2) 38 Ir. L. T. R. 214.

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ROSS, J.

We must deal with the estate as a whole throughout the section. This was not controverted by the Crown here, but it was urged that, as the actual sale took place outside the Land Judge's Court, and in the Land Commission Court, the only owner who could be considered was the owner of the insolvent moiety, and of the insolvent life estate—not those entitled to the estate in remainder.

I cannot agree with this contention. Both clauses in the section contemplated proceedings for a sale in the Land Judge's Court. In the first case, the estate is actually sold in the Court; in the second, it is sold elsewhere, though an absolute order was in force at the passing of the Act. The test in both cases is the same. The circumstances are the circumstances existing in the Land Judge's Court, and the words, as I have shown in *Grogan's Estate* (1), point to the practice in that Court. If the life estate in the settled moiety were merely to be sold, the contention on the part of the Crown would be unassailable. But the whole fee is being sold. The only parties interested are the owners of the remainder, and such an estate would certainly never be sold in the Land Judge's Court without consulting such owners.

I am, therefore, of opinion that the case does not come under the saving clause or exception, and I declare that the bonus is payable, and direct it to be added to the purchase-money.

Solicitors for the vendor: *Moore, Keily, & Lloyd.*
Solicitor for the Treasury: *W. M. Lane.*

J. E. W.

(1) [1896] 1 I. R. 614.

TIGHE *v.* DOLPHIN.

(1905. No. 148.)

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1905.
Dec. 1, 2, 6, 13.

Mortgage—Marriage settlement—Representation that lands are unincumbered—Contribution to charge—Right of settled lands to indemnity—Purchaser for value of unsettled lands—Marshalling.

The owner of two estates subject to a mortgage settled one of them on his daughter's marriage. There was no covenant against incumbrances in the settlement, but a verbal representation was made previously to the execution of it by the settlor to the intended husband, that the estate was free from incumbrances, and it was conveyed without reference to incumbrances. The other estate passed under the settlor's will to his widow, who conveyed it to a purchaser for value, with notice of the settlement, but not of the verbal representation:—

Held, that the purchased estate was bound to indemnify the settled estate from the mortgage debt.

Averall v. *Wade* (Ll. & G. 252, temp. Sugden) followed. *Barnes* v. *Racster* (1 Y. & C. C. C. 401) explained and distinguished.

TRIAL OF ACTION.

This action was brought to have it declared that the lands of Benbeg, in the barony of Loughrea and County of Galway, were liable to indemnify the lands of Danesfort, situate in the same barony and county, against all principal and interest due on foot of a mortgage of July 15th, 1858, made between Peter Hubert Dolphin of the one part, and Peter Paul Daly and Christopher M'Evoy of the other part. The facts of the case, so far as material, were as follows:—

Christopher M'Evoy and Peter Paul Daly, the mortgagees, were the trustees of the marriage settlement of Peter Hubert Dolphin, the mortgagor, which was executed on January 28th, 1852. This settlement contained a power to invest the trust funds (£2000 secured by mortgage and £2000 3 per cent. bank annuities) upon (amongst other investments) mortgage of real estate in Ireland. These funds were settled upon the usual trusts, and Peter Hubert Dolphin and his wife, or the survivor, had power to

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appoint to the children of the marriage. At the date of this settlement Peter Hubert Dolphin was owner in fee-simple of the lands of Danesfort in the barony of Loughrea and County of Galway. Part of the lands were subject to a life interest of the mother of Peter Hubert Dolphin, which had long since ceased. In the year 1858 Peter Hubert Dolphin purchased in the Landed Estates Court, Ireland, certain lands in the same barony known as Benbeg, and also the lands of Cross, in the barony of Kilconnell and County of Galway. To enable him to do so, he borrowed £3620 from the trustees of his marriage settlement out of the trust funds, and by mortgage of July 15th, 1858, granted the lands of Danesfort, Benbeg, and Cross to the trustees to secure repayment of the said sum of £3620, with interest at 4 per cent.

There were four children of the marriage, daughters, namely, Marie Antoinette Dolphin, now wife of the plaintiff Thomas Tighe, Georgina Dolphin, now Georgina Egan, wife of Laurence M. Egan, and Annie Dolphin, and Mary Teresa Dolphin, who were not married.

In the year 1875, a marriage between the plaintiff and Marie Antoinette Dolphin was in contemplation, and upon treaty for the marriage, Peter Hubert Dolphin, through his solicitor, sent to the plaintiff's solicitor a proposal as to the settlement he intended to make on his daughter, which proposal stated the lands of Danesfort to be free from incumbrances. Certain alterations in the proposal were made and agreed to on the part of the plaintiff and Peter Hubert Dolphin, and as so altered the proposal was as follows:—"Mr. Dolphin proposes to give his daughter on her marriage a sum of £2000 in cash, and to settle the reversion of his estate called Danesfort, held by him in fee. The lands, which are free from incumbrances, are to be settled on Peter Hubert Dolphin for life, remainder to Mrs. Dolphin, his wife, for her life, remainder to Mr. Tighe and his wife for their joint lives, and the life of the survivor, remainder to the use of the second or other younger sons of the said intended marriage in tail male, and, if no younger sons, the lands to go to the eldest son; the second or other sons (except the eldest) to take the name of Dolphin upon inheriting the estate. If no male issue, the lands to go to the first and other daughters of the marriage, and their issue in tail male,

they also taking the name of Dolphin. Power to be reserved to Mr. Dolphin to charge the lands, either by deed or will, with a sum of £2000 for any purpose he shall think proper."

It was subsequently agreed that successive life estates should be settled on the plaintiff and his wife, instead of the estate for their joint lives, and the life of the survivor; but no alteration to that effect was made in the proposal.

The statement of claim, from which the above statement of facts is taken, alleged that Peter Hubert Dolphin repeatedly urged upon the plaintiff the value of the lands of Danesfort, as lands free from incumbrances, and insisted that the plaintiff should, on his part, settle on his intended wife and children some valuable fee-simple properties which he possessed, and that the plaintiff, believing and acting on the statement that Danesfort was free from incumbrances, agreed to do so, and, as the plaintiff believes, heads of settlement of his property were submitted to the solicitor of Peter Hubert Dolphin, and were approved of, but the plaintiff was unable to find any written heads of settlement, though he recollected discussing terms with Peter Hubert Dolphin and his legal advisers, and it was arranged that the settlement, as agreed on, should be executed, and the marriage took place.

Accordingly, by indenture, dated 28th April, 1875, and made between the plaintiff of the first part, Marie Antoinette Dolphin of the second part, Peter Hubert Dolphin of the third part, Oliver Dolphin and James Winslowe Tighe of the fourth part, and Walter Joyce and Henry de Blaquiere of the fifth part, the plaintiff put in settlement for the benefit of his intended wife and children of the marriage various properties of large value of which he was the owner, and Peter Hubert Dolphin, after reciting that he was seised in fee of the lands of Danesfort, and reciting the treaty for the marriage, granted the lands of Danesfort to Walter Joyce and Henry de Blaquiere, in trust for himself for life, with remainder to Mrs. Dolphin for life, with remainder to the plaintiff for life, with remainder to Marie Antoinette Dolphin for life, with remainder to the second and every other son of the plaintiff (not being an eldest son entitled to the estates put in settlement by the plaintiff) according to seniority in tail male, and the indenture contained a proviso that the second or other younger son of the

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plaintiff should, within one year from becoming entitled in possession to the lands of Danesfort, take the name and arms of Dolphin, and Peter Hubert Dolphin was empowered by the said indenture to charge the lands of Danesfort by deed or will with a sum of £2000, which power he never exercised

By deed of April 29th, 1879, made between Christopher M'Evoy and Peter Paul Daly of the one part, and Peter Hubert Dolphin of the other part, the lands of Cross were released from the mortgage of July 15th, 1858, and part of the said lands were afterwards sold by Peter Hubert Dolphin. The statement of claim then alleged that the plaintiff was, until very recently, and after the death of Mrs. Dolphin, entirely ignorant of the existence of the mortgage of July 15th, 1858, or the release of April 29th, 1879, and believed the lands of Danesfort to be unincumbered, as Peter Hubert Dolphin had represented them to be.

On April 9th, 1890, Georgina Dolphin married Laurence M. Egan, and by settlement of that date made between Peter Hubert Dolphin of the first part, Georgina Dolphin of the second part, Laurence M. Egan of the third part, and the plaintiff and Martin J. Comyns of the fourth part, certain property of Georgina Dolphin was assigned to the plaintiff and Martin J. Comyns upon trust for her benefit, and that of her intended husband, and the issue of the marriage. The settlement contained a covenant for the settlement of any after acquired property of Georgina Egan. There were seven children of the marriage. Martin J. Comyns died in January, 1905, and no trustee was appointed in his place.

Peter Hubert Dolphin by his will, dated January 7th, 1897, left his property called Cross to his daughter Mary Teresa and to her children, and in default of issue to Mrs. Tighe and Mrs. Egan and their children. He left to his wife his properties called Benbeg and Danesfort for her life, and everything else real and personal that he might die possessed of, binding her at the same time to pay his debts. He appointed the plaintiff Thomas Tighe and Laurence M. Egan his executors. He died on July 7th, 1898, and his will was proved on November 2nd, 1898, by his executors.

By deed of July 26th, 1898, Mrs. Dolphin conveyed to her daughters Annie Dolphin, Mary Teresa Dolphin, and Georgina

Egan, as tenants in common, the lands of Benbeg and other property in consideration of their covenanting to pay to the National Bank the sum of £2300, due by the personal representatives of Peter Hubert Dolphin to the Bank. This sum was subsequently paid by them to the Bank. The deed contained limitations over of the property in the event of Annie and Mary Teresa Dolphin dying without issue, which are not material. On November 30th, 1898, Mrs. Dolphin, in exercise of the power of appointment conferred on her by the settlement of January 28th, 1852, appointed the sum of £3620, stated to be outstanding on mortgage on the lands of Benbeg and Cross, to Georgina Egan, Annie Dolphin, and Mary Teresa Dolphin, in equal shares, and released her life interest therein. She died on March 26th, 1904.

On February 10th, 1905, this action was commenced by the plaintiff, claiming to have the settled lands indemnified against the mortgage debt, not only by the lands of Benbeg, but also by the other real and personal estate of Peter Hubert Dolphin, and to have, if necessary, his real and personal estate administered, but at the trial the claim was limited to the lands of Benbeg and the unsold portion of Cross. The defendants were Annie Dolphin, Mary Teresa Dolphin, and Georgina Egan, and the infant children of Laurence M. Egan and Georgina Egan. Thomas Tighe was made a defendant as trustee of Georgina Egan's marriage settlement, and he and Laurence M. Egan defendants, as personal representatives of Peter Hubert Dolphin. The defendants Annie Dolphin, Mary Teresa Dolphin, and Georgina M. Egan, by their statement of defence, denied that they had any actual or constructive knowledge or notice of the alleged proposal set out in the statement of claim, or of any agreement to settle the lands of Danesfort free from incumbrances, or that it had been represented that the said lands were free from incumbrances.

The plaintiff was the only witness examined at the trial: he proved that Peter Hubert Dolphin had before the marriage assured him that the lands of Danesfort were unincumbered; that he only became aware of the mortgage after the death of Mrs. Dolphin, in 1904. The effect of his evidence is stated in the judgment.

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O'Connor, K.C., *Fetherstonhaugh*, K.C., and *Tighe*, for the plaintiff:—

If several estates are subject to a mortgage, and the owner conveys one for value free from incumbrances, the purchaser of that estate has an equity to have the mortgage thrown upon the other estates: *Averall* v. *Wade* (1); the over-riding incumbrances there were judgments, and there was a covenant against incumbrances: *Hartley* v. *O'Flaherty* (2), a case of a Crown debt, which was treated as analogous to a mortgage over-riding an entire estate. If the equity once attaches to the estate not so conveyed, it is fixed, and cannot be disturbed by any subsequent purchaser: *Aicken* v. *Macklin* (3). The defendants were subsequent purchasers of the unsettled lands, and cannot disturb the equity which arose by reason of the marriage settlement. *Averall* v. *Wade* (1) was followed in *Handcock* v. *Handcock* (4): there was no covenant against incumbrances there, as there was in *Averall* v. *Wade* (1); but only a covenant for quiet enjoyment. It is true that here there is no covenant against incumbrances nor for quiet enjoyment; but the lands were conveyed as if free from incumbrances, and, in addition, there was an express representation made to the plaintiff that the lands were free from incumbrances, and upon the faith of which the marriage which took place. The doctrine of *Averall* v. *Wade* (1) is explained by Christian, L.J., in *Ker* v. *Ker* (5), as resting on specific performance. He says, at p. 30: "When the owner of the incumbered estate sells, or settles for valuable consideration, a parcel of it, and there is a covenant against incumbrances, or a declaration that the estate is free from incumbrances, or the nature of the dealing shows that the land is sold or settled *as if* free from incumbrances, equity, instead of leaving the purchaser to his action for damages, will specifically perform the covenant, be it express or implied, by making the lands retained by the grantor exonerate those he has sold or settled. *Averall* v. *Wade* (1) was followed in England in *Hughes* v. *Williams* (6 and in *In re Jones; Farrington* v. *Forrester* (7), and in Ireland

(1) Ll. & G. (temp. Sugden), 252.
(2) Ll. & G. (temp. Plunket), 208.
(3) 1 Dr. & Wal. 621.
(4) 1 Ir. Ch. R. 444.
(5) I. R. 4 Eq. 15.
(6) 3 Mac. & Gord. 690.
(7) [1893] 2 Ch. 461.

by Monroe, J., in *In re Roche's Estate* (1). The effect of the cases is stated in Dart on Vendors and Purchasers, 7th ed., p. 850.

Matheson, K.C., Oulton, K.C., and *C. Roche*, for the defendants Annie Dolphin, Mary Teresa Dolphin, and Georgina Egan :—

The lands of Benbeg are liable to contribute to the mortgage, but not to indemnify the lands of Danesfort against it. There is no covenant against incumbrances in the settlement, nor anything in it amounting to a representation that the lands of Danesfort were free from incumbrances.

The mere conveyance of the lands without a covenant is not a conveyance as if free from incumbrances: where no covenant against incumbrances is inserted in a marriage settlement, it is to protect the settlor, who may have incumbered. This case is not governed by *Averall* v. *Wade* (2). There was no purchaser for value there, for a judgment creditor is not a purchaser for value. The rule there laid down does not apply in the case of a purchaser for value. This appears from Sir E. Sugden's observations at p. 258. He does not express approval of the judgment in *Hartley* v. *O'Flaherty* (3), where it is stated that a subsequent purchaser from the mortgagor cannot be in a better situation than the mortgagor himself; nor does Christian, L.J., in *Ker* v. *Ker* (4), which was a case of a voluntary conveyance, where the doctrine could not apply. The defendants had no notice of the plaintiff's alleged equity, for notice of the settlement was not notice of the equity, which could not be inferred from it, there being nothing in it to show that the lands were conveyed free from incumbrances. In *In re Roche's Estate* (1) there was an express statement in the settlement as to incumbrances, and the subsequent incumbrancer had notice of it. In *In re Jones*; *Farrington* v. *Forrester* (5), where North, J., refers to *Ker* v. *Ker* (4), the parties were volunteers. The claim of the plaintiff here depends on the doctrine of marshalling, that is the right to throw the mortgage on the two estates upon the estate which was not conveyed to him; but this is an equity which will not be enforced against a purchaser of the

(1) 25 L. R. Ir. 271.
(2) Ll. & G. (temp. Sugden), 252.
(3) Ll. & G. (temp. Plunket), 208.
(4) 1. R. 4 Eq. 15.
(5) [1893] 2 Ch. 461.

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other estate: *Barnes* v. *Racster* (1). There there were three mortgagees, Barnes, Hartright, and Williams. Barnes's mortgage was on two estates of Racster, the owner. Hartright was only on one, and Williams, the third mortgagee, was on both, with notice of the prior mortgages. Hartright sought to throw Barnes on the estate which was not included in his own mortgage; but Williams objected, and contended that the burden of the first mortgage should be borne by the two estates rateably, and that was so decided by Knight Bruce, V.-C. *Hartley* v. *O'Flaherty* (2) and *Averall* v. *Wade* (3) were cited. The Vice-Chancellor held that Hartright had not any equity to prevent Racster doing what he did, namely, carrying the estate on which Hartright had no charge to market and selling or pledging it as charged rateably and *pari passu* with the other estate, on which Hartley had a charge. The principle of that case applies here, and the defendants are in the position of Williams there. *Barnes* v. *Racster* (1) has been followed in numerous cases, *e.g.*, by Lord Hatherley in *Wellesley* v. *Lord Mornington* (4); by the Court of Appeal in *Flint* v. *Howard* (5); and by Cozens Hardy, J., in *Baglioni* v. *Cavalli* (6). It appears from the judgments in *Flint* v. *Howard* (5) that the question of notice is immaterial. Kay, L.J., says, at p. 73, that the right to marshal is not enforced against anyone except the mortgagor and his lega representatives claiming as volunteers under him, but not against a mortgagee or purchaser of the other estate. *Barnes* v. *Racster* (1) was explained and followed in this country by Brady, L.C., in *In re Lawder's Estate* (7).

As regards the verbal representation alleged to have been made by the settlor, it ought not to be acted on: it was followed by a settlement which must be presumed to have expressed the contract between the parties, so far as property was concerned: *Jameson* v. *Stein* (8); *Loxley* v. *Heath* (9); *Sands* v. *Soden* (10); *Kingdon* v. *Tagert* (11). It may have been intended to pay off the mort-

(1) 1 Y. & C. C. C. 401.
(2) Ll. & G. (temp. Plunket), 208.
(3) Ll. & G. (temp. Sugden), 252.
(4) 17 W. R. 355.
(5) [1893] 2 Ch. 54.
(6) 83 L. T. (N. S.) 500.
(7) 11 Ir. Ch. R. 352.
(8) 21 Beav. 5.
(9) 1 D. F. & J. 489.
(10) 31 L. J. (N. S.) Ch. 870.
(11) 17 Ch. D. 361.

gage before the settlement was executed. If a search had been made at the time, the mortgage would have been disclosed; the claim is only made after the death of the settlor, and when the parties cannot be put in their original position. The plaintiff has practically got a present of the £2,000, which the settlor did not raise.

W. F. Kenny, K.C., and *James O'Brien*, for the minor defendants, supported the arguments on behalf of the other defendants.

Jonathan Pim, for the defendant Laurence Egan, personal representative of Peter Dolphin.

Fetherstonhaugh, K.C., in reply :—

Barnes v. *Racster* (1) does not touch this case ; it was a case of several mortgages ; here there is only one mortgage, and the question is as to contribution between persons taking under the mortgagor. The plaintiff asks for exoneration, which springs from contract, not marshalling, which is on a different principle. *Averall* v. *Wade* (2) and the other cases go on contract. The vendor or settlor expressly or impliedly contracts that the lands are free from incumbrances. The doctrine is not a purely Irish doctrine, though none the worse for that. Dart on Vendors and Purchasers, 7th ed., p. 850, *Ker* v. *Ker* (3) (p. 30) : *In re Jones* ; *Farrington* v. *Forrester* (4). Although doubt was thrown upon *Averall* v. *Wade* (2) in *Stronge* v. *Hawkes* (5), there is no case in England contrary to it. *Hartley* v. *O'Flaherty* (6) shows that the lands in settlement acquired a right to be exonerated, and any subsequent dealing with the lands by the settlor cannot do away with that equity. A representation that the lands are unincumbered is not necessary, having regard to the observations of Lord St. Leonards in *Averall* v. *Wade* (2) (p. 259), and in his work on Vendors and Purchasers, pp. 744, 746, and of Christian, L.J., in *Ker* v. *Ker* (3) (p. 30), as the lands were conveyed as if free from incumbrances. In the

(1) 1 Y. & C. C. C. 401.
(2) Ll. & G. (temp. Sugden), 252.
(3) I. R. 4 Eq. 15.
(4) [1893] 2 Ch. 461.
(5) 4 De G. & J. 652.
(6) Ll. & G. (temp. Plunket), 208.

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deed of appointment of November 30th, 1898, the trust funds are stated to be outstanding on a mortgage of the lands of Benbeg and Cross. But we rely on the representation which was made here, and say that it should be made good. *Burrowes* v. *Lock* (1); *Low* v. *Bouverie* (2). There is nothing to show that the settlement was not intended to carry out the representation; we say that it was intended to carry it out. It is a matter of pure conjecture why the settlor did not exercise the power to charge the lands with £2,000. The defendants do not say that they had no notice of the settlement; they purchased from the devisee under the settlor's will, which mentions the settlement. The effect of it may not have been present to their minds, but notice of it was notice of the equity. Even if they had no notice of the equity, that makes no difference, as they were assignees of an equity of redemption only, and took subject to all equities affecting the mortgagor at the date of the assignment: *Harter* v. *Colman* (3).

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THE MASTER OF THE ROLLS (having referred to the facts as stated in the pleadings) proceeded as follows:—

Mr. Tighe (who was married in 1875) was examined before me, and proved, to my complete acceptance, that Mr. Dolphin had before the marriage assured him more than once that the lands of Danesfort were unincumbered. He (Dolphin) had very likely forgotten that Danesfort as well as Benbeg had been mortgaged in 1858, when the latter lands were purchased. Most likely he supposed from failure of recollection that the mortgage was only on the lands which were in part bought with the mortgage money. Be this as it may, he did represent Danesfort as unincumbered. The evidence to prove the proposal is not very satisfactory, and, had its reception been objected to, I should perhaps have rejected it without better proof. [The Master of the Rolls here referred to the proposal.] It was admitted without objection, perhaps because I had intimated that I should not much regard it as an aid in construing the actual settlement. I do not therefore lay stress upon it, and must decide the case in fairness to the defendants apart from it. But the fact remains, *quantum valeat*, that Dolphin did repeatedly tell the

(1) 10 Ves. 470. (2) [1891] 3 Ch. 82. (3) 19 Ch. D. 630.

intended husband of his daughter that Danesfort, which was to be settled, was free from incumbrances.

The case therefore is this. Tighe, the plaintiff, became a purchaser for the highest consideration known to the law of certain interests in Danesfort, under the belief, caused by the statements of the settlor, that it was free from incumbrances. But, as a fact, it had been previously mortgaged by the settlor himself along with Benbeg and Cross. Nothing now can interfere with the right of the mortgagees to look to both or either of these denominations for the whole of this claim. But Tighe says: "As between me and the persons now entitled to the equity of redemption in Benbeg who are volunteers or derive only equitable interests under the settlor, I am entitled to have the mortgage debt thrown wholly on Benbeg before Danesfort can be resorted to. The defendants cannot be in any better position than Dolphin himself would have occupied, being volunteers; and Dolphin, who put Danesfort in settlement on my marriage, would have been bound to give effect to his conveyance for value by paying off the mortgage."

There is no question of the defendants having acquired the shield of any legal estate. Their estates are all purely equitable; and even if they are, as the trustees of Mrs. Egan are, purchasers for value from Dolphin, they have only purchased an equity, and are therefore only entitled to what Dolphin could equitably give them. Their contention is that all the lands, Danesfort and Benbeg, must contribute rateably to the payment of the mortgage of 1858, and that beyond the obligation to contribute they are under no duty to indemnify Danesfort out of Benbeg.

Averall v. *Wade* (1) is the leading case on this special branch of the law, and, if it applied, would rule this case. It is a case in which the question lay between a marriage settlement and judgment creditors. That judgments are innocent assurances needs not to be said; but that circumstance cannot amount to a distinction between it and the present case, for equitable voluntary securities can rank no higher; that is, neither of them can draw out of the owner more than he has to give.

(1) Ll. & G. (temp. Sugden), 252.

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There is a distinction, however, in this, that in *Averall* v. *Wade* (1) the settlement contained a covenant that the lands were unincumbered, while here there is no such covenant.

A covenant for further assurance has been held to be equivalent for this purpose to one that the premises are free from incumbrances; that is, the question being rested on analogy to specific performance (as stated by Christian, L.J., in *Ker* v. *Ker* (2)), the one covenant would be as good as the other for that purpose. I do not for myself quite follow this reasoning, but it seems to be established that it is so in cases of contribution as distinguished from exoneration, *e.g.* as in *Hartley* v. *O'Flaherty* (3). *Barnes* v. *Racster* (4), which I referred to at length during the argument, was pressed as being of an opposite tendency. It is explained, I find, by Lord St. Leonards in his book on Vendors and Purchasers (14th ed., p. 747), as follows:—"Where a man having two estates, A and B, mortgaged A to one, and then A to another, and then A and B to the first mortgagee for the old and a new debt, and, lastly, A and B to a stranger; and all three mortgagees had notice of the prior incumbrances from time to time; it was held that the second mortgagee of A could not throw the first mortgagee upon B, so as to leave A a clear fund for his second mortgage at the expense of the third mortgagee, and the notice was considered immaterial. But the Court left untouched the two questions; first, what would have been the rights of the second and third mortgagees (under the second and fourth mortgages) had the first mortgagee's security upon B preceded, and not been subsequent to, the second mortgagee's security upon A? and, secondly, what would have been the rights of the parties had the third mortgagee's security (the fourth mortgage) not existed at all, or not existed until after the commencement of the proceedings in the suit?"

It is thus no authority on this point, and does not conflict with *Averall* v. *Wade* (1). Nor, indeed, does any case among the number cited here or in the notes to *Aldrich* v. *Cooper* (5) purport to do so.

Unless, then, the absence of a covenant for title or for further

(1) Ll. & G. (temp. Sugden), 252.
(2) I. R. 4 Eq. 30.
(3) Ll. & G. (temp. Plunket), 208.
(4) 1 Y. & C. C. C. 401.
(5) 2 Wh. & T. L. C., 6th edition, p. 82.

assurance makes a difference, this case is ruled by *Averall* v. *Wade* (1).

In *Ker* v. *Ker* (2) the question arose as between mere volunteers, and was not as to a right to indemnity, but merely as to contribution. The Court of Appeal, reversing the judgment of Walsh, M.R., held that there was a right to contribution; and, so far, the case in its decision has not the force of a determination of the very question which here arises. But Christian, L.J., the greatest of our jurists on questions of this kind, says (at p. 30): "The doctrine is mainly one of Irish origin; but having obtained the sanction of Sir E. Sugden in *Averall* v. *Wade* (1), it must be accepted as established, although the observations of Lord Justice Turner in *Stronge* v. *Hawkes* (3) make it extremely doubtful whether, whenever the point comes to be fully considered in England, it will be sustained. The Master of the Rolls appears to have considered that it made no difference whether the incumbrance was a debt of the grantor's own, or a paramount charge for which he lay under no personal liability; and such was my own impression during the argument, but closer consideration has shaken that impression. The view I take of the case dispenses with my expressing any opinion on that point; and I have not, for that reason, examined the facts of the reported cases with sufficient care to be able to assert whether or not in any of them the doctrine was applied to incumbrances of the latter class. I shall assume therefore that it is so applicable, that is to say, that, supposing the deed of 6th April, 1846, had had a valuable consideration, Stopford would have been entitled to throw the whole of Vaughan's judgment on the devised estates. But it is because that deed had, in fact, no consideration at all, that I hold the case to be untouched by this doctrine of marshalling. For what is the rationale of that doctrine? In my opinion, it is specific performance. When the owner of the incumbered estate sells, or settles for valuable consideration, a parcel of it, and there is a covenant against incumbrances, or a declaration that the estate is free from incumbrances, or the nature of the dealing shows that the land is sold or settled *as if free from incumbrances*" (these are Sir Edward Sugden's words in *Averall* v. *Wade* (1)),

(1) Ll. & G. (temp. Sugden), 252. (2) I. R. 4 Eq. 15. (3) 4 De G. & J. 652.

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"equity, instead of leaving the purchaser to his action for damages, will specifically perform the covenant, be it express or implied, by making the lands retained by the grantor exonerate those he has sold or settled. This is the way Sir Edward Sugden explains the doctrine in *Averall* v. *Wade* (1)."

The present case is one in which the settlement of 1875 is, subject to the paramount charge, one for value; without notice, and which bound the settlor—and, at least, all his estate in the whole of the lands settled, that is, Danesfort. But there is no covenant for title or further assurance; and, assuming the view of the Lord Justice to be correct, the question would narrow itself into this—Is this transaction (Tighe's settlement) one in which "the nature of the dealing shows that the land is sold or settled *as if* free from incumbrances"?

Apart from express covenant, it is, I think, impossible to conceive a case which would fulfil this last condition, if the settlement of 1875 does not. In form, the conveyance is absolute, exactly what it would have been if the estates were held in fee-simple and completely at the disposal of the settlor. It would be little short of a fraud if the settlor, so dealing with them, knew that the lands were heavily incumbered, so that the settlement would, or might, in fact settle nothing. But he expressly represented them as free from incumbrances, though not in terms in the deed.

Mr. Dart states the rule thus (7th ed., p. 947):—"If two estates X and Y are subject to a common charge, and estate X be sold to A, A will, as against the vendor and his representatives, have a *prima facie* equity, in the absence of express agreement, and whether or not he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X. If, then, the estate Y be subsequently sold to B, with notice of the charge and of the prior sale of X to A, B purchases with notice of A's equity, and the entire charge must rest primarily upon Y." And Lord St. Leonards says in his book on Vendors and Purchasers, 14th ed., p. 744, and this is one of the passages founded on authority which shows the importance of Mr. Tighe's evidence—"So when a person inquires of another whether he has any incumbrance on the estate, and states

(1) Ll. & G. (temp. Sugden), 259.

his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance. Again, where a purchaser of an equitable right inquires of the trustee of the legal estate whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser although he pleads forgetfulness in excuse."

I think Mr. Tighe's settlement entitled him to marshal by throwing on the unsettled lands the liability to the subsequent charges created by Dolphin.

I ought to notice an argument for the defendants that, as Dolphin by the settlement of 1875 reserved to himself the right to charge Danesfort with £2000, and did not exercise that right, it ought to be assumed that somehow, by some dealing not appearing, he had compromised with the trustees of the settlement, or agreed with them, that in consideration of their not claiming against Benbeg or insisting on any indemnity he would not raise this £2000. If that is not the way it was put, I cannot appreciate any legal ground for the contention, for whether he raised or did not raise this charge could not of itself affect the import and scope of the settlement. But of such an agreement I see no shadow of evidence; and the non-exercise of this power by Mr. Dolphin may have been owing to many reasons of which I know nothing.

I think, therefore, that the plaintiff is entitled to the relief he asks for in the first paragraph of the claim.

Solicitors for the plaintiff: *Whitney & Moore.*

Solicitors for the defendants: *William Roche & Sons.*

W. L.

M. R.
1906.

Jan. 31.
Feb. 1, 9.

In re JOHN EGAN, Deceased.
EGAN *v.* STACK.
(1905. No. 750.)

Graft—Expiration of lease—New letting to executrix—Tenant for life—Purchaser for value—Notice of facts creating equity.

The widow and executrix of a testator, to whom he had bequeathed a farm held for a term of years for life, and after her death to her nephew, was accepted as yearly tenant by the landlord at an increased rent after the expiration of the term. She afterwards sold her interest to her brother, reserving a room in the house for herself. The brother, who was aware of the will of the testator and of the circumstances of the new letting, went into possession and paid the rent, but receipts were given in the name of the representatives of the testator. After the death of the widow the nephew brought an action against her brother, to have the yearly tenancy declared a graft on the lease:—

Held, that it was a graft.

Dempsey v. *Ward* ([1899] 1 I. R. 463) distinguished.

Trial of Action.

This action was brought by John Egan as a legatee under the will of John Egan, of Laccamore, in the county of Kerry, deceased, against Edward Stack and Michael Stack, to have the personal estate of the said John Egan administered; and for a declaration that the tenancy or interest subsisting in the farm and lands of Laccamore formed part of the assets of the said John Egan, and was bound by the trusts of his will, and was a graft on the tenancy subsisting in the said farm and lands at the death of the said John Egan; and for a declaration that the plaintiff was entitled to possession of the said farm and lands and for an account of the rents and profits thereof from the death of Mary Egan, widow of the said John Egan. The plaintiff also asked for a declaration that he was entitled to such of the cattle and stock upon the lands as represented the cattle and stock thereon at the death of John Egan, and to the proceeds of the sales of such cattle and stock as

had been sold. Edward Stack was sued as executor of the testator. Michael Stack was in possession of the farm and lands sought to be recovered. The following witnesses were examined at the trial:—The plaintiff, G. F. Trench, agent for the landlord, the defendant, Michael Stack, and Mary Stack, his wife. The facts of the case are stated in the judgment of the Master of the Rolls.

O'Connor, *K.C.*, *D. F. Browne*, *K.C.*, and *P. Kelly*, for the plaintiff:—

The new tenancy was a graft on the old lease. Mary Egan was in possession in a fiduciary capacity. The doctrine of graft was limited by the decision of the Court of Appeal in *Dempsey* v. *Ward* (1), but there was no fiduciary relation in that case.

Bourke, *K.C.*, and *P. Lynch*, for the defendant, Michael Stack:—

We rely on two points—1, that the letting to Mary Egan was not a graft on the lease; and 2, that the defendant was a purchaser for value without notice of the alleged equity. The operation of the doctrine of graft has been restricted very much by *Dempsey* v. *Ward* (1), and the earlier cases, such as *Mulvany* v. *Dillon* (2) and *O'Brien* v. *Egan* (3), would not now be followed. Here no one had a right to the farm on the expiration of the lease; the landlord could let it to anyone he liked. In *Biss* v. *Biss* (4), a recent English decision, the Court of Appeal held that a next-of-kin was entitled to retain for his own benefit a lease granted to him of premises held by the intestate as yearly tenant after the expiration of a lease.

2. The defence of purchaser for value without notice does not often arise in these cases of alleged graft. It arose in *Stratton* v. *Murphy* (5) and *Mill* v. *Hill* (6). Here the defendant had not notice of the alleged equity, which was an obscure and doubtful one: Sugden on Vendors and Purchasers, 14th ed.,

(1) [1899] 1 I. R. 463.
(2) 1 B. & B. 409.
(3) 5 L. R. Ir. 633.
(4) [1903] 2 Ch. 40.
(5) I. R. 1 Eq. 345.
(6) 3 H. L. Cas. 828.

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ch. 24, ss. 1, 65-67; Lewin on Trusts, 11th ed., p. 1078, citing *Cordwell* v. *Mackrill* (1) and *Parker* v. *Brooke* (2); Conveyancing Act, 1882, s. 3. He may well have assumed that the sale by Mary Egan was as executrix: *In re Venn and Furze's Contract* (3).

A. M. Sullivan, for the defendant, Edward Stack (4).

D. F. Browne, K.C., in reply:—

This case is not like *Dempsey* v. *Ward* (5); Mrs. Egan was never disturbed; she had an interest in the holding, and she was in a fiduciary capacity, which prevented her having the new tenancy for herself: *Keech* v. *Sandford* (6). The principle there laid down was applied in Ireland by the Vice-Chancellor to the case of an administratrix in *Kelly* v. *Kelly* (7), to an executor in *M'Cracken* v. *M'Clelland* (8), and to a tenant for life in *O'Brien* v. *Egan* (9). These cases were discussed and distinguished in *Dempsey* v. *Ward* (5), when the principle of *Keech* v. *Sandford* (6) was recognized, but held not to apply. *Biss* v. *Biss* (10) is in favour of the plaintiff's contention: see the observations of Collins, M.R., at p. 56, and Romer, L.J., at p. 61.

The equity sought to be applied here was a well-known equity, and the defendant had notice of the facts which gave rise to the equity. He knew there was a will, and assuming that he did not know its contents, which it is submitted he did, he was bound to inquire. Mrs. Egan did not sell to him as executrix, and he was well aware of the circumstances under which she got the new tenancy.

(1) 2 Eden, 347.
(2) 9 Ves. 588.
(3) [1894] 2 Ch. 101.
(4) He submitted that Edward Stack had been wrongly made a defendant as regards the claim of graft, and that two separate causes of action had been wrongly joined in the one action, and cited authorities in support of his contention; but it is not necessary to mention them, as no decision was given on the point.—[REP.]
(5) [1899] 1 I. R. 463.
(6) 2 W. & T., Eq. Cas. 693.
(7) I. R. 8 Eq. 403.
(8) I. R. 11 Eq. 172.
(9) 5 L. R. Ir. 633.
(10) [1903] 2 Ch. 40.

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THE MASTER OF THE ROLLS :—

This action is brought chiefly to have a question of alleged graft decided, but it also asks for the administration of the personal estate of John Egan. As to that, I shall probably hear something afterwards. The way in which the question of graft arose was this. John Egan, who died on July 19, 1875, made his will on the same day, and by it he bequeathed as follows (I quote the words of the will) :—"I bequeath unto my wife my land and cattle, consisting of twenty-two cows, one horse, one donkey, eight pigs, ten calves, and two yearlings, together with my dwellinghouse, and all goods and furniture therein contained during the term of her life, and after her death the land, house, and stock to be given to my nephew, John Egan." John Egan is the present plaintiff. The testator also bequeathed to his wife the sum of £642, a curious amount. It does not appear how it was arrived at. Then he gave pecuniary legacies to relatives and in charity, and also bequeathed to his wife what he called the remaining £165, making about £1242 in all in legacies, and appointed her his executrix.

The widow proved the will on July 2, 1877. She took under the gift in the will for her life the testator's land, whatever that was, and the stock, and furniture in the house. The statement of claim (paragraph 3) states that John Egan at the time of his death was possessed of the cattle, farming stock, and other chattels and effects mentioned in his will, and of money and other property, including a leasehold interest in the farm and lands of Laccamore and Laccabeg, containing about 51A. 2R. 28P. situate in the barony of Clanmorris and county of Kerry, demised by a lease of March 25, 1868, from William Talbot Crosbie to John Egan, for the term of twelve years, from the 25th March, 1868. This was a very short term. The lease would expire on March 25, 1880, a little less than five years after John Egan's death.

It appears that, on the death of John Egan, Mary Egan entered into possession of the lands and premises, looked after and managed the same, and from time to time sold cattle and stock which had been there at the death of John Egan, and received the proceeds of such sales. The statement of claim goes on to state that the lease expired on March 25, 1880, Mary Egan

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being then in possession of the farm under John Egan's will; and that by reason of such possession Mary Egan obtained from the landlord a new letting of the farm to her as tenant from year to year at the yearly rent of £54. (This was an increase from the rent of £44 12*s.* 8*d.* reserved by the lease.) In and about the year 1883 Mary Egan, in consideration, as the plaintiff charges and believes, of a sum of £200, gave over the possession of the farm and of the cattle, stock, and effects then thereon to the defendant, Michael Stack, who thereupon went to reside on the farm, and so continued during the lifetime of Mary Egan, during which time he worked the farm and sold cattle and stock off the lands, being or representing cattle and stock which had been thereon at the death of John Egan, and received for his own use the proceeds of such sales. It then states that Mary Egan died on May 24, 1905, fifteen years after the expiration of the lease, and that her will was proved by the defendant, Edward Stack, her executor, on July 20, 1905. It is on her death that this action is brought.

These circumstances suggest that the doctrine of graft lies at the root of the plaintiff's title; Mary Egan had assented to the bequest to the plaintiff in the will; for an assent by an executor to the bequest to the first taker, under a series of limitations, enures for the benefit of all. The question is, whether the tenancy which was created in Mary Egan was a graft on the old lease.

The defence of Michael Stack is two-fold: first, he says that there was no graft; secondly, that he was a purchaser for value without notice. Mr. Sullivan appeared for the defendant, Edward Stack, the executor of Mary Egan, and she was executrix of her husband John Egan, and thus he was executor of John Egan, and in that capacity a claim is made against him to administer the personal estate of John Egan.

The lands were let on lease which expired in 1880, as I have said. There were five years to run of the lease of the farm on which Mary Egan remained after his death. That she was in possession under the will, there is no question. There could be no doubt that the term of years held by the testator and bequeathed by the will would have been held for the benefit of the plaintiff after her death.

There was some question as to the terms of the letting to Mary

Egan. Mr. Trench, the landlord's agent, said that the lease to John Egan and leases to a number of other tenants on the estate fell in about the same time, and that all the occupying tenants were in the same position. That was in 1880, before the Land Act of 1881, at a time when landlords and agents possessed much greater powers of regulating the relations of their tenants than since. I do not mean to go through Mr. Trench's evidence in detail. He took extraordinary care to define the position of Mr. Crosbie's tenants by entries in his books, which he produced and read. He said that within a week after the expiration of the lease Mary Egan came to him, and that he dealt with her as the occupying tenant. He told her that if she liked to take the farm at an increase of £9 8*s.* a year with no power to sublet, assign, or bequeath it, she might have it, or if she chose to give it up, allowance would be made for improvements. She refused these terms at first, as she wanted to have the farm to bequeath it, which he declined to allow. He gave receipts for the increased rent of £54 in the name of the representatives of John Egan all through; and this continued after he had refused to take Stack as tenant. He says that it was "certainly because she was in possession" that she got the new tenancy. Probably (he says) there was a written agreement, but it is now lost. In November, 1883, Mr. Trench gave her permission to bring in her brother the defendant, Michael Stack, to help her. He made her understand that her name would remain on the books, and that Michael Stack could not be returned as tenant. He only recognised Michael Stack to that extent. Rent was paid at the increased rate on April 4th, 1881. There was a hanging gale on the estate, and there were no arrears of rent. The last half-year's rent due under the lease on March 25, 1880, was paid on August 10, 1880.

There might possibly be some difficulty in saying whether, after the expiration of the lease, Mrs. Egan was at first tenant from year to year, or tenant at sufferance. She thought that she was tenant from year to year. She claimed the right to alienate the farm by will, but Mr. Trench refused to allow that. I think that there is no case for holding that she was only tenant at sufferance, or tenant at will; I think that on the

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evidence her position was that of a tenant from year to year, some of the added incidents being still under discussion. It is possible that some sort of symbolic possession of the premises was taken by the landlord after the expiration of the lease, but there is no legal evidence of it. In 1883 the transaction took place by which Michael Stack purchased Mary Egan's interest. When that became known to the agent, Mr. Trench, he decided that Michael Stack would not be taken by him as tenant. The right of the plaintiff, if any, did not accrue till 1905, and as there was a tenancy in the lands, either in the personal representative of John Egan, or in Michael Stack, the question is, was this tenancy a graft? It was urged on behalf of the defendant, Michael Stack, that since *Dempsey* v. *Ward* (1) the doctrine of graft was very much limited. I was referred to passages in the judgments of Lords Justice FitzGibbon and Holmes, where they say that the doctrine of graft had been pushed too far in this country, with which observations I respectfully agree. But is the decision in *Dempsey* v. *Ward* (1) applicable here? In that case there was no fiduciary relation; here Mary Egan was executrix, and was in a fiduciary relation. This distinction is all-important, and this case must be treated as to that extent uncovered by *Dempsey* v. *Ward* (1).

I only mean to refer to one other case, because it appears to me to resemble this case as nearly in law and fact as possible. It is not an Irish decision. I refer to *James* v. *Dean* (2), a case of high authority. It was argued first before Sir William Grant, whose decision was afterwards reversed on appeal by Lord Eldon. Lord Eldon, as his manner was, gave several judgments in the case, and the ultimate one is reported in 15 Vesey, where he adhered to the view before expressed, and reversed the decision of Sir William Grant. The marginal note in 11 Vesey, p. 383 (I very seldom refer to marginal notes, but this one is borne out by the judgment), is as follows:—"Bequest of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease. The term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death, as

(1) [1899] 1 I. R. 463. (2) 11 Ves. 383.

tenant by the year. Upon the general words, unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease obtained by the executrix, the widow, and tenant for life under the will, was held subject to the uses of the will; as the residue of the term at his death, if any, however short, would have been." One question very much argued there was whether under the terms of the will the gift was not so connected with the lease that nothing passed by the gift except the lease. It was held, reversing the decision of Sir William Grant, that the words of the will were wide enough to pass the intermediate interest, namely, the tenancy from year to year, and, that being so, that the new lease obtained by the executrix was taken by her on the trusts of the will. Lord Eldon says, at p. 388:—"If the lease had been renewed in the testator's life, when it is stated, that the Master of the Rolls thought, the intention was, that the bequest should pass nothing more than the term actually vested in the testator, when the will was made, no inclination of opinion would induce me to decide the contrary, unless they should refuse a case; for it is impossible for me to form any opinion upon such a point, which, if against that of the Master of the Rolls, ought to take from them the opportunity of having the legal title decided at law. Yet I feel so much difficulty to say, that is the true construction, that I cannot from deference to his Honour's opinion deprive the party of the very strong opinion I have against that construction." Then, at p. 391, he says:—"The testator held over after the expiration of the lease, either as tenant by sufferance, or at will, or from year to year. To make out the plaintiff's case, it must be contended that the testator was tenant from year to year; for, if he was tenant at will, the general doctrine is, that the death of either party determines the will; and it would follow of necessity that no interest passed by the bequest; and therefore the plaintiff could not qualify an interest in him by virtue of the bequest, unless he can say, the opportunity the executrix had of dealing with the estate her testator had in his life for an estate and interest fastens upon it a trust, not only for the general estate, but for the particular legatee of that property; though he cannot say, any interest passed by the will to him." Again, at p. 392, "I think it

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is impossible she could hold it for herself. Not applying it to this case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favour of that other residuary legatee; being a casual advantage from the dealing of the executrix; not an enjoyment of the property under the effect of a bequest the testator meant to make; for the bequest, operating nothing, must be considered as struck out, and not part of the will: like an executor becoming general occupant, or happening to take freehold estate, not limited to anyone. The question then is, whether the testator was tenant from year to year; and what is the consequence. That is also a subject *primæ impressionis*: quite new; but I have a strong inclination of opinion upon it. First, it is clear, if this testator had died at the close of the twentieth, and the commencement of the twenty-first, year of the lease, subsisting at the date of the will, there is no doubt the effect would have been that, though there was but a year to come, she would have been tenant for life, with remainder to the nephew for so much of the year as should not elapse in her life, and, if she had been tenant but for that year, and had renewed she could no more have said, she was not a trustee, because it was only for one year, than if she renewed in the tenth year. It is not the short or long duration of the interest that makes a difference." Again, he says, at p. 393: "If it would not pass, could the executrix avail herself of it to say, it was a beneficial interest to her? Upon the case I have just mentioned she could. Could she refuse to avail herself of it, if the intention was to give the benefit of it to this legatee? This Court would not permit her to renounce it, if he had an interest in it, which this Court would compel her to make good. The question then is, whether this is not the same, as if the lessee had died possessed of a term of which only one year remained; or which was only for one year; and the person who was tenant for life of that interest, in the course of that year renewed. It makes no difference that the possession goes on from year to year; for she would have it in every year as executrix, until renewal. I have a strong inclination that if you can make out at law, that the future lease, viz., a lease subsequent to the will, would have passed to James after the death of the wife, the estate he had, if an estate from year to year, would pass: and, if it did, all the consequences

follow, that result in this Court from a person, having a renewable interest, giving the estate to more than one, in succession."

It appears from the report that on March 15, 1805, the Attorney-General stated, as the fact was, that the lease expired instead of August, as had been supposed, at Lady-day preceding; and half a year's interest, due at Michaelmas, was actually paid to the landlord before the death of the testator, who was therefore accepted as the tenant. Lord Eldon said his opinion was, that if the testator was tenant from year to year, the renewed lease was taken for the trusts of the will, and directed the case to stand for an inquiry as to the fact. On August 27th Lord Eldon gave another judgment affirming what he had said before. He says, at p. 395:—The consequence is, his will operates to pass that estate he had in the premises to his wife for life, with remainder to the appellant; and the question is, as the interest, which passed at the testator's death, was an interest he could bequeath by will antecedent to his acquiring it, and that interest, though but a tenancy from year to year, being bequeathed to one for life, with remainder to another, if during the tenancy of the person, who took for life, acting upon the good will, that accompanies the possession, she gets a more durable term, whether the persons who are to take against her, are or are not entitled to say, that term is acquired for their benefit, as well as her own. If she had died in his lifetime, his term from year to year would have passed to the remainderman; who would have been specifically entitled to it. The consequence is, the term, though short, is bequeathed in these particular estates; and it cannot depend upon the question, whether the interest is long or short. Suppose, only a quarter of a year subsisted at the death of the testator; if the tenant for life did renew, it must have been made for the benefit of the persons to take afterwards, as herself. The question then is, whether the words pass that new interest the testator got, and whether, having acquired that as a continuation of the interest he had, and that passing, if at all, under the will, the circumstance of her being tenant only from year to year makes a difference. My inclination is, that it does not." The decree is then set out at p. 396. This decree was affirmed three years afterwards by Lord Eldon on a re-hearing, reported in 15 Vesey, 236. That case is not absolutely

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the same in its facts as the present, but, in my opinion, its principle is not capable of distinguishment.

Therefore, without going into other cases, I am of opinion that this tenancy acquired by Mary Egan, was held under the terms of the will, whether in possession of Michael Stack or not, and that the plaintiff is entitled to succeed, unless Mr. Bourke's second point, on which he mainly relied, is a good one, namely, that Michael Stack was a purchaser for value without notice. It was proved that £200 for the farm, or £433 for the farm and stock, was paid by him. He was a purchaser for value, but was he a purchaser without notice, which is a very different thing? I heard him examined, and have not the smallest doubt that he knew all the material facts. He was brother of Mary Egan. He knew of the will and its contents, and that there was law about it in Tralee. He knew what passed between Mary Egan and the agent for the landlord as to the new tenancy. I am satisfied on the facts that he had notice of everything connected with the property and the title to it.

But Mr. Bourke says that the equity arising out of these facts is a "doubtful equity" within the meaning of certain *dicta*, and that notice of it should not be imputed to a person in the position of Michael Stack. But notice of the same state of facts to one person must be notice also to another person, otherwise one man would be fixed with notice, and another of less education, and, perhaps, inferior intelligence, would not be. The law recognizes no such distinction. One cannot, in a case like this, take a measure of the intellectual attainments of a party to a contract, if he be of perfect capacity to contract. But can the facts here be said to amount to such a doubtful equity? I shall here also refer to one case only on this point, *In re Tottenham's Estate* (1), before Judge Hargreave, a very learned and careful Judge. It was a case where the question of graft arose, and I should if necessary have referred to it as confirming my view on the first point. There a person against whom judgments had been obtained and registered, became tenant from year to year of certain lands, and afterwards, in consideration of a surrender of the yearly tenancy, got a lease for a

(1) 16 Ir. Ch. R. 115.

term of years with a covenant for perpetual renewal. The lease, immediately on its execution, was deposited as security for a loan with a solicitor who acted for borrower and lender, and had notice of the tenancy from year to year. On the sale of the leasehold on the petition of the lender Judge Hargreave decided that the lease was a graft on the tenancy from year to year, and became vested in the lessee as trustee for the judgment creditors to the extent of their equitable charges, and that the petitioner, although a purchaser for value, took subject to those incumbrances on the assumption of their having been kept duly registered as judgments, the circumstances being such as to fix him with notice of their existence. Judge Hargreave says, at p. 125:—"It has been contended, and very properly, that there is no relation of trustee and *cestui que trust*, or other privity, between a debtor and his judgment creditor, and that the debtor is entitled to defeat it if he can. That no doubt is true, prior to the time when the creditor's equity attaches to the land, but when it attaches, the debtor having the legal estate becomes a trustee for the creditor who has got an equitable charge, to the extent of that charge; and he is no longer at liberty to extinguish the estate by surrender or otherwise; and, if he do so, I think it is open to the creditor to treat the new lease as a substituted or grafted interest. In this case, therefore, I think that the lease in the owner's hands was, when made, equitably charged with the judgments. The question then arises, how far, and under what circumstances, a purchaser from the owner is bound by this equity. I conceive that a purchaser is bound if he has notice of all the facts necessary to create the equity, and if the judgment on which the equity is based is duly registered, so as to bind a purchaser. In the circumstances of the present case, if the petitioner had become a purchaser of the tenancy from year to year, he would undoubtedly be bound by the judgment, for he has notice of it, and it is registered; and it is in no way necessary that he should be fixed with notice of the fact of registration. It appears to me that a purchaser of the lease is in the same position, if he has notice that the lessee had a prior tenancy from year to year, which never determined naturally, but was surrendered by the acceptance of the lease." And again, at p. 128, he says:—"I should also mention that the petitioner

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claims the legal title in the lease; he also having a judgment against the owner for this debt, which judgment has been registered by affidavit. I am not prepared to say that this is so, as there was a judgment of Mr. Porter's registered by affidavit before the petitioner's judgment was registered by affidavit; but, as I have come to the conclusion that the petitioner had notice of the facts which constitute the objector's equity, it is unnecessary to consider the question as to the legal estate."

I am, therefore, of opinion that the defendant's case fails on both points. It would be a disastrous innovation if, the facts being proved as here, the result was to depend on the greater or less capacity of the persons sought to be affected by notice. But I ought to add that the defendant Stack is a man of remarkable intelligence, perfectly aware of all the facts, and there is nothing whatever in his case to suggest that there should be a different rule applied to him from that which would apply to other persons. There must be a decree that the interest in the lands is bound.

The following is an extract from the judgment:—

"THE COURT doth declare that the tenancy or interest now subsisting in the farm and lands of Laccamore and Laccabeg, containing about 51A. 2R. 38P. statute measure, situate in the barony of Clanmorris and county of Kerry, in the pleadings in this action mentioned, forms part of the assets of John Egan, deceased, in the title hereof named, and is subject to the trusts of his will, and is a graft on the leasehold interest subsisting in the said farm at the time of the death of the said John Egan. And the Court doth declare that the plaintiff is entitled to the possession of the said farm and lands, and doth order that the defendant, Michael Stack, do forthwith deliver up possession of the said lands to the plaintiff. And the Court doth declare that the plaintiff is entitled to such of the cattle and stock now upon the said lands as represent the cattle and stock thereon at the death of the said John Egan, and to the proceeds of the sales of such of the said last-mentioned cattle as have been sold. And the Court doth order that the following inquiry be made at Chambers, that is to say—what cattle and stock were upon the said lands at the death of the said John Egan, and what cattle and stock now represent the same, and what sums were realised by sales of any portion of the said first-mentioned cattle and stock by the said Mary Egan other than by the sale to the defendant,

Michael Stack, and an inquiry as to what was the value of the cattle and stock on the said lands sold by the said Mary Egan, deceased, to the defendant, Michael Stack, and what sums were realised by the defendant, Michael Stack, by sales of any portion of the first-mentioned cattle and stock, or any cattle or stock representing the same. And the Court doth declare the said defendant, Edward Stack, entitled to the sum of £13 13*s.*, as and for his costs of this action."

Solicitor for the plaintiff: *T. J. Liston.*

Solicitors for the defendant, Michael Stack: *Huggard & Willington.*

Solicitor for the defendant, Edward Stack: *H. Walsh.*

W. L.

DUFFIELD *v.* M'MASTER.

(Record No. 12,054.)

Will—Gifts to children contingent upon surviving their parents—Vesting—Presumption in favour of.

A testator left a share of his property to trustees, upon trust for his son G. for life, or until he should become bankrupt, and after his death or bankruptcy to E., the wife of G., for life, and directed that in case there should be any child or children of G. living at the death of the survivor of G. and E., or at the other period thereinafter contemplated, then, from and immediately after the death of the survivor of G. and E., or from and after the death of E. and the bankruptcy of G., the said share should be held in trust for all and every, or such one or more exclusively, of the others or other of the children or child of G. by his then or any future wife, with such provisions for their respective maintenance, education, and advancement, at such ages, days, and times, and if more than one in such shares, as G. should by deed or will appoint; and, in default of such appointment, in trust for all and every such the children and child of G. who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or day of marriage, and if more than one in equal shares; and in case there should be only one such child, then the whole for such one or only child; provided that after the death of the survivor of G. and E., or the death of E. and the bankruptcy of G., and until the whole of the trust funds should become vested in such child or children, his trustees should apply a competent part of the income

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of the trust funds for the benefit of the children or child for the time being entitled thereto in expectancy towards his or her maintenance and education; and in default of such child or children of G., upon the trusts in his will declared concerning the premises thereby given in trust for his daughter I., and the other persons therein mentioned.

G. had one son, J., who attained age, married, and predeceased G., leaving children. E. predeceased G., who died without having become bankrupt:—

Held, by the Court of Appeal, affirming the decision of the Master of the Rolls, that the rule in *Emperor* v. *Rolfe* (1 Ves. Sen. 208) was applicable, and that J. took an absolute interest in the property on attaining age, although he did not survive G.

MOTION.

The proceedings in this matter were commenced by cause petition on October 19, 1867, to administer the trusts of the will and codicils of Maxwell M'Master, who died on January 24, 1869, leaving two children, George M'Master, one of the respondents, and Isabella Eliza Duffield, one of the petitioners. The testator by his will dated May 12, 1863, devised and bequeathed to his son, George M'Master, his heirs, executors, administrators, and assigns, all his lands and premises situate on the west side of Rathgar-road, in the county of Dublin, subject to two annuities therein mentioned, and devised and bequeathed to Alexander Parker and John Houghton certain lands and premises situate on the east side of Rathgar-road, aforesaid, and certain lands in the county of Limerick, to hold upon trust to pay the annual produce thereof to the testator's daughter Isabella, during her life, for her sole and separate use, and after her decease to stand seised and possessed of the said premises for the child or children of his said daughter as therein mentioned, and in default of such child or children, then in trust for his said son George, his heirs, executors, administrators, and assigns, in case he should be then living; and in case his said son George should not then be living, in trust for the children of his said son George then living, in equal shares, and if but one child, then for such child, and in case there should not be any child or children of his said son George then living, in trust for the testator's nephew, William M'Master, his heirs, executors, administrators, and assigns. The testator devised and bequeathed the residue of his property to the said Alexander

Parker and John Houghton upon trust to convert into money, and to retain so much as they should think sufficient for the purpose of forming an indemnity fund to meet any liability the said Alexander Parker might incur, or have incurred, as trustee of the marriage settlement of the testator's daughter Isabella, and until the same should be exhausted or released, to pay the income of two-fifths thereof to the persons and in the manner thereinafter provided with respect to two-fifth parts of the remainder of the testator's property, and to pay the income of three-fifth parts to the testator's son George, his executors, administrators, and assigns, and when the said principal fund should be released by the said Alexander Parker, his executors, or administrators, then to pay two-fifth parts thereof to the person or persons entitled to the two-fifth parts thereinafter mentioned, in trust for his daughter, Isabella, and others, and to pay the remaining three-fifth parts to his son George, his executors, administrators, and assigns; and, after disposing of his shares in the National Assurance Company, the testator directed his trustees to hold the residue and remainder of his property in trust as to three-fifth parts thereof for his son George, his executors, administrators, and assigns, and as to two-fifth parts in trust to invest and hold the money so invested upon the trusts declared of his property on the east side of Rathgar-road, and in the county of Limerick, which he had given in trust for his daughter Isabella, and the other persons therein mentioned.

By a codicil dated December 6, 1864, after reciting that he had by his will devised and bequeathed to his son George, his heirs, executors, administrators, and assigns, the premises on the west side of Rathgar-road, and had also directed his trustees to pay and make over three-fifths of what was therein described as the residue and remainder of his property to his son George, his executors, administrators, and assigns, and that the effect of such devises and bequests was to give him an absolute interest in the said premises and in the said three-fifths of the residue, and that he was desirous of limiting his estate and interest therein to an estate and interest for his life only, and of declaring the further trusts thereof thereinafter mentioned, the testator revoked his will, so far as concerned the devise and bequest to his son George of the premises on the west side of Rathgar-road, and the three-fifths of

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the said residue and remainder of his property, and devised and bequeathed to Alexander Parker and John Houghton, their heirs, executors, administrators, and assigns, the premises on the west side of Rathgar-road, described as held under a fee-farm grant, to hold upon the trusts therein declared, and directed that his trustees should hold the said premises, and three-fifth parts of the said residue and remainder of his real and personal estate, upon trust to pay the income thereof to his son George M'Master and his assigns during his life, or until he should become or be declared bankrupt, or become insolvent; and immediately after such decease, bankruptcy, or insolvency, upon trust to pay the income to Ellen M'Master, wife of the said George M'Master, during her life, and in case there should be any child or children of his said son George living at the time of the death of the survivor of them, his said son George and Ellen M'Master, his wife, or at the other period thereinafter contemplated, then from and immediately after the decease of the survivor of them, his said son George and Ellen, his wife, or from and immediately after the decease of the said Ellen M'Master and the bankruptcy or insolvency of his said son George, the said hereditaments, and also the said three-fifth parts of the said residue, should remain and be in trust for all and every, or such one or more exclusively of the others or other of, the children or child of his said son George, by his then present or any future wife, with such provisions for their respective maintenance, education, and advancement, at such ages, days, and times, and if more than one in such shares, as his said son George should by deed or will appoint, and in default of such appointment, in trust for all and every such the children and child of his said son George, who, being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or day of marriage, and if more than one in equal shares, and in case there should be only one such child, then the whole for such one or only child; provided that, after the decease of the survivor of them, his said son George and Ellen M'Master, his wife, or the decease of the said Ellen, and the bankruptcy or insolvency of his said son George, and until the whole of the said trust funds should become vested in such child or children, the trustees of his will should apply a competent part of the annual produce of such

trust funds and premises, for the benefit of the children or child for their lives being entitled thereto in expectancy towards his or her maintenance and education, and in default of such child or children of his said son George, then in trust for the persons, and to and for the uses, intents, and purposes in his will expressed and declared of and concerning the hereditaments and premises which were by his will given in trust for his daughter Isabella, and the other persons therein mentioned.

The testator died on January 24th, 1867, and on June 19th, 1867, letters of administration with the said will and codicils annexed were granted to the said Isabella Eliza Duffield.

Pursuant to orders made in the said matter a sum of £4000 New 3 per cent. stock was set aside to form an indemnity fund, as mentioned in the will of the testator, and two-fifths of the dividends on the said £4000 stock and on the stock standing to the credit of the matter representing the residuary estate were paid to Isabella Duffield and three-fifths thereof to George M'Master.

George M'Master died on August 20th, 1903. Probate of his will was, on October 15th, 1903, granted to J. A. Denning and John Ross Redding, the executors therein named. Isabella Eliza Duffield survived George M'Master; she was a widow, and had no children. George M'Master married Ellen Boyle, who died about the year 1895. He had only one child, namely, John Boyle M'Master, who died on March 22nd, 1889, in the lifetime of his father George M'Master, leaving four children surviving, namely Mrs. Joseph Isabella Morgan De Groot, Eleanor Irene M'Master, Maxwell M'Master, who subsequently died under age, and John Henry Stanislaus M'Master, who was still a minor and a ward of Court.

By deed poll dated November 29th, 1877, George M'Master purported to appoint the premises on the west side of Rathgar-road to his son John Boyle M'Master, subject to the life estates of himself and his wife, Ellen M'Master; and by indenture dated November 30th, 1877, being the settlement executed on the occasion of the marriage of John Boyle M'Master to Irene Henrietta Fitzpatrick, John Boyle M'Master purported to put the said premises on the west side of Rathgar-road in settlement for the issue of the marriage. By his will dated February 4th, 1889, John Boyle

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M'Master devised and bequeathed all his property to his wife Irene Henrietta M'Master, and appointed her sole executrix, and probate was granted to her on September 27th, 1892. Irene Henrietta M'Master afterwards married John Ross Redding, and died on March 5th, 1896, leaving by her will all her property to her four children above mentioned, and John Ross Redding, on April 9th, 1896, obtained letters of administration to her. William M'Master, the testator's nephew, predeceased Mrs. Duffield, and John Maxwell M'Master, his administrator, was appointed to represent the entire interest (if any) of William M'Master in the real and personal estate of the testator.

Mrs. Duffield was advised that, by reason of the events which had happened, a question arose on the construction of the codicil to the will of Maxwell M'Master, namely, whether the testator's grandchild, John Boyle M'Master, acquired a vested interest in the property situate on the west side of Rathgar-road, and in three-fifths of the testator's residuary estate, or whether the said property passed to Mrs. Duffield for life, with remainder in the events which happened to the heir-at-law and personal representative respectively of the testator's nephew, William M'Master, deceased.

On November 29th, 1904, a motion was instituted on behalf of Mrs. Duffield for a declaration as to the following matters:—

1. Whether three-fifths of the dividends which had accrued since the death of George M'Master on the sum of £17,868 4*s.* 11*d.* New Consols standing to the credit of this matter, and three-fifths of the dividends which should from time to time accrue on the said sum, should be paid to Mrs. Duffield, or be paid to the personal representative, when raised, of John Boyle M'Master.

2. A like declaration as to the dividends on the £4000 New Consols representing the indemnity fund in the will mentioned.

3. A declaration whether the rents and profits of the property on the west side of Rathgar-road accrued since George M'Master's death and accruing should be paid to Mrs. Duffield, or to the trustees of the marriage settlement of John Boyle M'Master.

On January 14th, 1905, administration de bonis non with the will annexed of John Boyle M'Master was granted to Mrs. De Groot and Eleanor M'Master, who were appointed to represent his entire interest (if any) in the real and personal estate of the testator.

T. Pakenham Law, K.C. (with him *Charles Brady*), for Mrs. Duffield :—

John Boyle M'Master took nothing under the codicil, as he was not living at the death of his father, George M'Master, the son of the testator. The gift in the codicil to the children of George M'Master was contingent on their surviving their father and mother. The words "in trust for all and every such the children or child," mean the children or child living at the time mentioned, and "such one or only child," means child then living. There is nothing in the gift in the will to the children of Isabella as to their surviving her, whereas the gift to the children of George is expressly made conditional on their surviving. This being so, the Court will not go contrary to the words of the gift, and infer an intention to provide for the children of George whether they survived him or not. [He referred to *Leader* v. *Duffey* (1); *Re Hamlet* (2); *Wakefield* v. *Maffet* (3); *Hotchkin* v. *Humfrey* (4); *Swallow* v. *Binns* (5); *Cobden* v. *Bagwell* (6).]

Ronan, K.C. (*D. F. Browne, K.C.*, and *Pierce Nolan*, with him), for Mrs. De Groot and Eleanor M'Master, children and personal representatives of John Boyle M'Master :—

The rule in *Emperor* v. *Rolfe* (7) is not affected by *Re Hamlet* (2), nor by *Leader* v. *Duffey* (1); the cases on the subject are summarized in the report of that case in the Court of Appeal, *In re Leader's Estate* (8). See in particular *Abbott* v. *Middleton* (9) and *Jeyes* v. *Savage* (10) there discussed. The provision in the codicil for children in default of appointment cannot be read as absolutely excluding children who do not survive their parents. The words "in default of such children," mean in default of children attaining twenty-one. John Boyle M'Master attained twenty-one, and, therefore, he took a vested interest, although he predeceased his father. The power of appointment, which includes a power of advancement, is important as showing the intention of the testator

(1) 13 A. C. 294.
(2) 39 Ch. D. 426.
(3) 19 A. C. 422.
(4) 2 Madd. 65.
(5) 1 K. & J. 424.
(6) 19 L. R. Ir. p. 171.
(7) 1 Ves. Sen. 208.
(8) 17 L. R. Ir. 279.
(9) 7 H. L. Cas. 68.
(10) L. R. 10 Ch. App. 555.

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to enable his son to provide for his children: *Howgrave* v. *Cartier* (1); *In re Leader's Estate* (2). The word "such" in the gift in default of appointment is ungrammatical, or, at any rate, it should receive a prospective construction, and refer to such children as should attain twenty-one.

Wilson, K.C., for the minor J. H. S. M'Master, in the same interest.

Serjeant Dodd and *M'William*, for John Maxwell M'Master:—

The terms of the codicil are unambiguous: only children who survive are to take. It is true that there is no provision for grandchildren, but the testator was not bound to provide for them. The interpretation suggested, namely, that the property vested at twenty-one, irrespective of whether the son survived his father or not, will only be adopted in a doubtful case. Even if the word "such" did not occur in the gift in default of appointment, that would make no difference, because it is covered by the introductory words of the clause "and in case there should be any child of my said son George living. . . ." The word "such" links the two parts of the clause, introductory and operative, together. [They referred to *Wilmott's Trusts* (3); *Wakefield* v. *Richardson* (4); *Howgrave* v. *Cartier* (1).]

Ignatius J. O'Brien, K.C., for the personal representative of George M'Master and the trustees of John Boyle M'Master's marriage settlement.

Charles Brady, in reply:—

There is a difference between the gift to Mrs. Duffield and the gift to George M'Master; there is no time limit as to Mrs. Duffield's children, but there is as to George M'Master's children. The Court is not to start with a predisposition caused by some rules as to settlements: the testator has drawn a distinction between the children of his son and those of his daughter. The power of appointment in the codicil contains benefits for a contingent class

(1) 3 V. & B. 79.
(2) 17 L. R. Ir. at p. 303.
(3) L. R. 7 Eq. 532.
(4) 13 L. R. Ir. 17.

only: (*a*) those who survive George M'Master and his wife; and (*b*) those who need not necessarily survive George M'Master, but who must survive George's wife, if George becomes a bankrupt.

The testator says that in a certain event nothing is to go to greatgrandchildren, but the property is to go to his nephew. He was at liberty to do that if he liked. The codicil is very carefully drawn; it may be unreasonable from the view of those who are disappointed. A gift by will is different from the case of a trust declared by a marriage settlement, because in the former there is no supposition that any persons can be intended to take, except those described as takers: *Tucker* v. *Harris* (1). The Court is not at liberty to approach a will with a predisposition in favour of a particular rule of construction applying: *Leader* v. *Duffey* (2); *Re Hamlet* (3).

The power of appointment is restricted to persons living at the particular time, and the gift in default of appointment makes the property go to the same class of persons as would take under the power. They must be children of George M'Master who survive the period named.

The words in the gift in default of appointment "such the children" are good old-fashioned English, and refer to something which has been mentioned before; so, too, the provision in the case of only one such child means a child of the class above described. The provision for maintenance enabled the trustees to provide for minor children to whom George M'Master had appointed, or who survived him or his wife after his bankruptcy.

The gift over took effect, as there was no such child, *i.e.* no child who survived George.

THE MASTER OF THE ROLLS:—

Feb. 7.

The rule of law applicable to the construction of wills is that "not the intention merely, but the expressed intention" is to be ascertained and carried out: *Shore* v. *Wilson* (4); and "it is not the duty of a Court to search for the testator's meaning, otherwise than by fairly interpreting the words he has used," taking

(1) 5 Sim. 538.
(2) 13 A. C. 294.
(3) 39 Ch. D. 435.
(4) 9 Cl. & F. 525.

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the whole instrument into consideration: *Abbott* v. *Middleton* (1). If it be impossible by this process to find out what was meant, no more is to be said. But experience has enabled the Courts to lay down some rules designed to help in construing ambiguous documents, sometimes extending even and supplying, modifying, or omitting words, but never contradicting them. One of those rules, not primarily applied to wills, but now clearly applicable to them so far as concerns provision for a testator's children, is the well-known principle laid down in *Emperor* v. *Rolfe* (2); *Howgrave* v. *Cartier* (3); *Woodcock* v. *Duke of Dorset* (4); *Perfect* v. *Lord Curzon* (5); *Jeyes* v. *Savage* (6); and a host of other cases: and recognised as law in *Wakefield* v. *Maffett* (7) by the House of Lords. That principle is stated in Williams on Executors, 1113-1115, as follows:—

"In construing a settlement or will which makes a provision for children subject to a prior life-interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not; and if the instrument is incorrectly or *ambiguously* expressed, or if it contains *conflicting* and *contradictory* clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the rational presumption is, that the child acquires a vested and transmissible interest at the period when it is most needed, viz. at twenty-one, if a son, or on marriage or at that age, if a daughter." The editor then refers to *Wakefield* v. *Maffett* (7) and adds this qualification:— "But when the testator has unequivocally expressed an intention, that a provision to be made for his children shall depend on their surviving both or either of their parents, the Court must give effect to that intention, and can only lean to the presumption in favour of children, where the intention of the testator is ambiguously expressed."

I had to consider the cases in *Cobden* v. *Bagwell* (8); and we are all familiar with them. It would be waste of time now to do

(1) 7 H. L. Cas. 68.
(2) 1 Ves. Sen. 208.
(3) 3 V. & B. 79.
(4) 3 Bro. C. C. 569.
(5) 5 Madd. 442.
(6) L. R. 10 Ch. App. 555.
(7) 10 A. C. 422.
(8) 19 L. R. Ir. 150.

more than mention these; but there is one, almost the most recent, to which I must for a moment allude, I mean *Leader* v. *Duffey* (1) in the House of Lords. That, too, was the case not of a will but of a settlement; and the actual decision did not require any reference to the principle of *Howgrave* v. *Cartier* (2) or the like. As matter of mere construction of the instrument their Lordships held that the gift to children was in no way restricted to children "in being" at the death of the tenant for life, whatever may have been the case in reference to the alternative gift to grandchildren; and thus, as no question arose in reference to the interest of a child who died before the tenant for life, there was no need and no room for calling in aid the principle in question, for the practical result was the same without it. But the case was relied on by Mr. Pakenham Law as indicating an opinion by Lord Chancellor Halsbury that *Emperor* v. *Rolfe* (3) is no longer a guide even in cases to which it would heretofore have been applied. I cannot think that this is correct. It is inconceivable that the Lord Chancellor could have meant to reverse, especially in a case where he held the point did not arise, an unbroken chain of judicial authority from the time of Lord Hardwicke down to *Wakefield* v. *Maffett* (4) in the House of Lords (just three years before *Leader* v. *Duffey* (1)), in which one of their Lordships, Lord Watson, said: "I entertain no doubt that *Emperor* v. *Rolfe* (3) is a binding authority in all cases where circumstances are similar"; where Lord Blackburn said: "the present case is ruled by *Emperor* v. *Rolfe*" (3); and where Lord Fitz Gerald examined and acted on that case, and the others to which I have referred.

There is, however, no doubt that Lord Halsbury used words which indicated a disinclination to allow plain language to be controlled by any preconception of contrary intention. He says, at p. 300:—"My Lords, I am very glad that in the view which I take of this case I am not called upon to resort to those rules of construction upon which so much has been said at the Bar and in the Courts below. The imperfection of human language as an instrument for giving expression to precise and definite thought is not much aided by giving the same words in the same instrument

(1) 13 A. C. 294.
(2) 3 V. & B. 79.
(3) 1 Ves. Sen. 208.
(4) 10 A. C. 422.

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a different meaning when used by a person in loco parentis from the meaning the same words would bear if used by a stranger in blood to the objects of his bounty. I think there could be no better illustration of the difficulty of applying such rules of construction to any instrument than the contrast between the language of Lord Hatherley in *Swallow* v. *Binns* (1), and Sir John Leach in *Bright* v. *Rowe* (2), and Sir George Turner in *Farrer* v. *Barker* (3). One learned Judge speaks of a 'necessary inference and an implication of law,' and of the Court 'leaning strongly' in favour of this or that supposition; while other learned Judges place restrictions on the rule by the declaration that 'the Court is not to go out of its way by a forced construction to raise this implication,' admitting that the implication must be 'upon the natural and plain construction of the words'; and to use Sir John Leach's expression, 'the rule is not to be one of arbitrary construction.' All these refinements and nice distinction of words appear to me to be inconsistent with the modern view—which is, I think, in accordance with reason and common sense—that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole, in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

If I may respectfully say so, I venture entirely to concur in these observations. The rule in *Emperor* v. *Rolfe* (4) is only to be applied when the language of the settlement (or will) is found to be ambiguous. I said during the argument that in every case upon the subject, without exception, the rule is in terms confined to cases of ambiguity or contradiction, and is never once set up against what the Court has deemed to be clear words. Even when

(1) 1 K. & J. 417.
(2) 3 My. & K. 316.
(3) 9 Hare, 737.
(4) 1 Ves. Sen. 208.

Judges have used such words as James, L.J., did in *Wilmott's Trusts* (1), when he speaks of an "unrebuttable presumption," it will be found that that language is applied to the presumption of the intention in the mind of the settlor, and not to the construction to be placed upon his words. Such expressions may be too strong, but "unrebuttable presumption" of an intention to do something is very different from an "unrebuttable presumption" that it has been done. *Re Hamlet* (2), though differing in its facts, is a strong authority for construing such gifts in accordance with the language actually employed; and the judgment of Cotton, L.J., shows the view entertained of the effect of *Leader* v. *Duffey* (3). *Re Hamlet* (2) was argued in the Court of Appeal on July 31st, and August 2nd, 1888, and judgment was given on August 4th; *Leader* v. *Duffey* (3) was decided in the House of Lords on May 14th, of that year. Cotton, L.J., says, at p. 434:—"Rules of construction are only intended to aid us where there is an ambiguity, and not to enable us to get rid of the express words of the testator if expressed in clear language. This view is supported by the observations of Lord Halsbury in *Leader* v. *Duffey* (3), where he said that it was the duty of the Court to construe the words of the instrument with such help as could be obtained from the instrument, and not to look at rules of construction as positive rules to which effect must be given even where the testator has expressed a different intention."

Thus in the present case, the first question is, whether there is any such ambiguity in the language used as to compel, or, shall I say, enable, me to have recourse to the presumption that the testator meant, that is consciously designed, though using doubtful words, to provide a vested interest in any son of his son George who should attain twenty-one or marriage. The question is not what I may imagine he would have done had he seen clearly the effect of what he was doing. If that were the point, there need be no great difficulty in coming to a conclusion. It is hardly possible to suppose that the testator deliberately intended to exclude the entire line of his son George's descendants, however numerous and meritorious or

(1) L. R. 7 Eq. 532. (2) 39 Ch. D. 426. (3) 13 A. C. 294.

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needy they might be, if no child of George, though of age and married, and having a family, should survive George's mother, even though she might have survived the testator and her husband by fifty years.

What then does the codicil say? It is on the first codicil that the question must depend; but that means in this case on both codicil and will, for they are, by the testator, inseparably connected. Whoever drew the former had the latter before him; for it is referred to again and again, and they are united, not merely as will and codicil always are, but by special reference, and expressed connexion.

In the will George took an absolute estate in what was left to him, so far as his original share (houses and three-fifths of the "rest and remainder") is concerned. But besides the original share, he was left a contingent interest in the share of his sister Isabella. I am not at present referring to the indemnity fund. It is very curious to note exactly how this is done:—"and in default of such child or children of my said daughter Isabella then in trust for my son George, his heirs, executors, administrators, and assigns, in case he shall be then living, and in case my said son George shall not be then living, in trust for the children of my son George then living in equal shares, and if but one child then for such child, and in case there shall not be any children or child of my said son George then living, in trust for my nephew William M'Master of Dundalk the son of my brother John M'Master his heirs executors administrators and assigns."

Isabella's share is not given to her out and out. The testator settles it very much in the ordinary way. There is nothing to confine the estate conferred upon her children to such as should survive her or anyone else; but it goes to such of her children as should attain twenty-one or marry. In default of such child or children, it goes over to George absolutely, "in case he shall be *then* living" (*i.e.* at the death of Isabella and her children under twenty-one and before marriage). Yet in settling the indemnity fund, the testator left George the three-fifths absolutely; "to pay three-fifths thereof to my son George, his executors, administrators, and assigns."

If he is not "then living," to whom does it go? To his

children "*then living*," equally; and if there be only one, to such one; and in case there be no child or children of George "*then* living," then over to William M'Master. It is impossible for language to be clearer or more free from doubt. Isabella's children were to take, if of age or married, independently of surviving anyone or any event. George's children were not to take unless they survived George and Isabella and her children, if the latter died under twenty-one and before marriage. William M'Master was to take wholly irrespective of his surviving any period whatever. It would baffle the art of man to say why this curious arrangement was made; for George's own original share was absolute, as was his contingent interest in the indemnity fund. But so it is, and no one can either suggest any reason for it, or question that it is so. Anything given by will is in our law matter of bounty; and the testator could do as he pleased.

We come then to the first codicil, dated December 6, 1864, made more than a year and a half after the will, which bears date May 12, 1863, made too, as I have said, with the will actually, not merely constructively, before the draftsman. Both will and codicil are reaffirmed in a second codicil of 5th January, 1867.

I do not read the first codicil as indicating diminished regard for the testator's son. It seems clearly intended to protect the property left to him against the risks to which traders are liable. On that assumption, the limitations of Isabella's two-fifths in the will, if and when it came to George, could not be bodily repeated in the codicil in reference to his original share: because in the will he took an absolute interest if he survived Isabella and her children if any, as prescribed; and that absolute interest would pass to his creditors if his business failed. Therefore the clause in the will could not be used as a precedent in drawing the codicil, so far as the quantity of interest given to George was concerned. Hence he is confined to a strict life estate at most, with clauses carrying the property over in the event of his bankruptcy and the like. A life estate is provided for his wife surviving, upon which the contingent interests of his children must also be made to depend in possession at least. But with these exceptions, necessitated by the very object in view, the clauses in the will, assuming

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that so far as they went they correctly embodied what the testator meant, might possibly be repeated and transferred by the codicil to the three-fifth share and other benefits conferred upon George directly; and it is to be observed that in the portion of the will to which I am now referring, the language is clear, affording no room for the application of *Emperor* v. *Rolfe* (1), or any assumption founded on presumed intent.

Then, what does the codicil do? Mrs. Duffield's argument is, if the true construction of it be that it makes the original share given first to George and his children accord with the gift in the will, save as to the extent of George's interest, there is no more reason to wonder at the codicil than at the will, unable as we may be to explain the motive of either. The codicil revoking the direct gifts to George directs the trustees to hold the property in question on trust to pay the income to George the son for life, or till bankruptcy, &c., and from and after the decease or bankruptcy to pay the income to his wife Ellen M'Master for her life: "and in case there shall be any child or children of my said son George living at the death of the survivor" of George and his wife, or on his bankruptcy, &c., "then from and after the death of the survivor of George and his wife," and from and after the decease of the wife and the bankruptcy, &c., of George "for all and every or such one or more of the children or child of George by his present or future wife . . . as George shall by deed or will appoint."

Pausing here, nothing can be more clear than that the power to appoint is only to arise in one event, that of there being a child or children of George living at the death of the survivor of George and his wife (or such other period, bankruptcy or the like, as was contemplated). But the event on which the existence of the power depends does not purport, in terms at all events, to determine the class to take under it. On the contrary, the class to take as objects of the power is defined as "all and every or such one or more exclusively of the others or other of the children or child of my said son George by his present or any future wife," with powers of directing provisions for maintenance, education, and advancement. Not a word about surviving anybody. No expression of an intention in favour of "such" children. If there was one child during

(1) 1 Ves. Sen. 208.

the prescribed period, the power would arise, not otherwise, but the objects are described without reference to it. Another consequence of this carelessly drawn will is that the donee of the power could never know whether he possessed it or not, since he could not tell, when executing a deed or making a will, whether the prescribed event would or would not happen. It is hardly matter of speculation that the draftsman mixed up in his mind two things really unconnected, viz.—(1) the necessity of keeping the previous life estates intact, and (2) as George (who might predecease his wife) was to exercise his power by deed or will, it was plain that he could not, by will, confer the subject-matter on anyone not living at his decease.

I may add that it was not argued before me that the question, which sometimes arises, of a stirpital survivorship applies to the case.

It is further manifest that it cannot have been intended to read the words "then living" into the definition of the class to take either under the power or in default of its exercise, from this consideration.

The period at which the class is to be ascertained according to the plaintiff, is in one event the death of Mrs. M'Master and the bankruptcy of her husband. If he became bankrupt in her lifetime, no child of a second marriage could ever take anything, because on plaintiff's construction it could not, if born after its father's bankruptcy, be then living. It could not come into being during the lifetime of the first wife.

Taking the language used in its literal, ordinary, strict, construction then, the power of appointment embraces all the children of George by his present or any future wife.

We come then to the gift in default of appointment, for it is plain that as George's son and only child died before both tenants for life, there could be no valid exercise of the power.

The gift in default is: "In trust for all and every such the children and child of my said son George who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or day of marriage, to be divided" equally.

Obviously the whole question in the case turns upon the word

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"such" in this clause. If it were not there, the clause would not contain anything to support the contention of Mrs. Duffield's counsel. Mr. Law, indeed, argued that even without it, the meaning would be the same, and "perfectly clear," taken in connexion with the gift under an appointment. I have shown, however, that that gift is in terms quite general, so that it is a confusion of ideas to bring into the definition of the objects of the power in this will the event on which the power is to arise. If so, there is here a typical instance of a vicious circle.

What then is the meaning of this word "such" as it stands? I think the natural—I must not say the obvious—meaning is referable to the last antecedent to which it could refer, namely, "the children or child of my son George by his present or any future wife," and that it does not incorporate and bring up the remoter reference to survivorship. It would be straining words to hold that it did. It might also be connected with the word "who" which follows it; for though "such . . . who" is not so idiomatic English as "such . . . as," one never knows what a testamentary draftsman may do; and Addison uses the phrase, an authority good enough for me, on such a point. In his Remarks on Italy, he says: "There is no place in Europe so much frequented by strangers, whether they are such as come out of curiosity—or *such who* are obliged to attend the Court of Rome on several occasions" (1): and in the Book of Esther, chap. iv., verse 11, the words occur: "Except such to whom the king shall hold out the golden sceptre."

In short, you cannot make this testator commit the blundering absurdity of depriving his only son's children of all interest in his property at the time when it would be of use to them, in favour of a collateral relation, without straining and forcing the language he has used; straining the definition of a class to take in default of appointment, so as to make it correspond with the class to take under the power—and straining the definition of the objects of the power by incorporating with it the event on which it is to arise. There is no rule of law that both classes must necessarily correspond, though usually they do.

(1) Addison, Remarks on Italy (Bohn), p. 420.

There is here little need of calling in *Emperor* v. *Rolfe* (1), though that and the other leading cases on the subject strongly fortify the conclusion at which I have arrived. At the very lowest, there is no reason for holding that, because the testator has used foolish and inexplicable language in one part of his will, the error should be carried on into other parts where, as they stand, no such error occurs.

I think John Boyle M'Master took an absolute interest in the three-fifths and in the houses and premises on attaining twenty-one or marriage, not by appointment, but by direct gift.

Another question is as to the destination of the indemnity fund established by the will, and subsequently ascertained at £4000.

The will contains two residuary clauses, one disposing of the "rest and residue" of his property, and the other of the "residue and remainder."

Out of the "rest and residue" the testator takes this indemnity fund (*inter alia*) and settles it, and he then proceeds to deal with the "residue and remainder." Of course, anyone of the words, rest, residue, or remainder, would be sufficient to make a good residuary bequest; but the testator uses them in a special sense, applying the designation rest and residue to the residuary estate before withdrawing the indemnity fund and the National Assurance shares, and residue and remainder to what is left. In the codicil he deals with residue—but how? He does not say "as to the residue and remainder" of my property, but "what is therein" (*i.e.* in the will) "described as the residue and remainder," and again, "so far as concerns the three-fifth parts of what is in my said will described as the residue and remainder of my property."

It is impossible to draw from these words any conclusion but one, viz. that the indemnity fund is not comprised in the general words of the codicil. The revocation of the absolute gift in the will to George does not extend to this £4000, which accordingly passes under the gift of it in the will. The result is that George took an absolute interest in three-fifths of it, which now belongs to his personal representative.

(1) 1 Ves. Sen. 208.

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On June 20th, 1905, after discussion of the minutes of the order to be made pursuant to the judgment of February 7th, the Court declared that on the true construction of the will and codicils of Maxwell M'Master, and in the events which had happened, three-fifths of the dividends which since the death of George M'Master had accrued, and which should from time to time accrue, on the sum of £17,868 4*s.* 11*d.* New Consols standing to the credit of the matter should be paid to the personal representative of John Boyle M'Master, and that three-fifths of the dividends which, since the death of George M'Master had accrued, and which should from time to time accrue, on the sum of £4000 New Consols standing to the credit of the matter and separate credit of the said indemnity fund should be paid to the personal representative, when raised, of the said George M'Master, and that the rents and profits which since the death of the said George M'Master had accrued, and which should from time to time accrue, in respect of the testator's property on the west side of Rathgar-road should be paid to Angelo Fahy and William G. Armstrong, as trustees of the settlement of November 30th, 1877, and the Court declared all the parties entitled to their costs of the said motion and of this order, including the said discussion on the minutes, when taxed and ascertained, out of the residuary estate of the testator, and ordered that the hearing of the said motion should, for the purpose of such taxation, be treated as an adjourned hearing on further consideration of the matter.

On July 18th, 1905, on the application of counsel for Josephine Isabella Morgan de Groot and Eleanor Irene M'Master, legal personal representatives of John Boyle M'Master, an order was made by the Master of the Rolls dealing with the *corpus* of the sum of New Consols to the income of which the applicants had been declared entitled by the order of June 20th, and declaring that the applicants were entitled, subject to the payment of the costs thereinafter mentioned, to three-fifths of the sum of £17,868 4*s.* 11*d.* New Consols standing to the credit of the matter, and that the dividends on two-fifths of the residue remaining after payment of the said costs should be paid to Mrs. Duffield. It was further ordered that three-fifths of the dividends on the indemnity fund

of £4000 New Consols be paid to the credit of the estate of George M'Master, which was being administered in the said Court, and that the remaining two-fifths of the said dividends be paid to Mrs. Duffield. The Court further declared that Angelo Fahy and William George Armstrong, the trustees of the settlement of November 30th, 1877, were entitled to the rents and profits of the said property on the west side of Rathgar-road, and that the receiver who had collected the rents and profits of the said property since the death of the said George M'Master should be at liberty till further order to pay the said rents and profits to the said trustees.

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W. I.

John Maxwell M'Master appealed (1).

Appeal. Nov. 17, 20, 21. Dec. 1.

Serjeant Dodd, Matheson, K.C., and *M'William*, for the appellant.

Ronan, K.C., D. F. Browne, K.C., and *Pierce Nolan*, for the executors of John Boyle M'Master.

Ignatius O'Brien, K.C., and *Littledale*, for the personal representative of George M'Master.

Herbert Wilson, K.C., for the minor J. H. M'Master.

The arguments were substantially the same as are fully reported in the Court below.

FITZ GIBBON, L.J. :— Dec. 1.

We reserved judgment because valuable property is at stake, and we had been referred to many authorities. We find it impossible to allow the appeal without disturbing the dynasty of decisions founded upon *Emperor* v. *Rolfe* (2), of which Lord Eldon said, in 1804, "these cases, if they are to be shaken, must be

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.

(2) 1 Ves. Sen. 208.

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shaken in the House of Lords." In each of them, the instrument to be construed contained some provision which, read literally and by itself, imported a contingency into a gift to objects towards whom the settlor stood in the parental relation, and the Court, therefore, had to struggle, but struggled successfully, with express words in order to construe the gift as vested.

The will and codicil of Maxwell M'Master furnish more and stronger arguments in favour of vesting, and contain weaker indications of contingency, than many instruments discussed in previous cases where vesting was held absolute. Counsel referred us to some twenty-five authorities. If we include cases cited in these, most of which bear directly upon the question, we should count them by the hundred.

I select, in order of date, six authorities, with each of which a reversal of the order under appeal would, in my opinion, be inconsistent.

1. Lord Eldon: *Powis* v. *Burdett* (1), March 6, 1804.

2. Sir. W. Grant: *Howgrave* v. *Cartier* (2), July 29, 1814.

3. Sir J. Leach: *Perfect* v. *Curzon* (3), 1820.

4. Lord Hatherley: *Swallow* v. *Binns* (4), 1855.

5. Sir E. Sullivan, affirmed by this Court: *Wakefield* v. *Richardson* (5), in 1883; affirmed by the House of Lords without calling on the respondent's counsel (6), in 1885.

6. This Court, *Leader's Estate* (7), 1886; affirmed by the House of Lords (8), May 14, 1888.

For a detailed discussion of the cases, and for a full statement of the points to be considered, I refer to the judgments delivered in this Court in *Leader's Estate* (7). Though the House of Lords upheld our decision there upon a narrow ground peculiar to the instrument under consideration, which was the first ground of decision here also, no dissent was expressed by the Lords from our statement of the law, and it would not be for us to narrow or question it now.

But we have also the authority of the English Court of Appeal,

(1) 9 Ves. 428.
(2) 3 V. & B. 79.
(3) 5 Madd. 442.
(4) 1 K. & J. 417.
(5) 13 L. R. Ir. 17.
(6) 10 A. C. 422.
(7) 17 L. R. Ir. 279.
(8) 13 A. C. 294.

In re Hamlet (1), August 1, 1888; where the principle to be gathered from all the authorities was stated, after the decision of the House of Lords in *Leader's Case* (2), as broadly and clearly as ever.

For the rule, for the instances of its application, and for the lengths to which Courts have gone in requiring *all* the clauses and provisions of a settlement made by a parental settlor to be consistent clear and unambiguous, before gifts to children are cut down or construed as contingent, I refer to the judgment of the Chief Baron in *Leader's Estate* (3), and to what I then said in endeavouring to supplement that judgment.

The settlor, Maxwell M'Master, died in 1867, leaving a son George M'Master, and a daughter, Isabella Duffield, him surviving. Mrs. Duffield is still living, George M'Master died in 1903, his wife Ellen having predeceased him. He had an only son John Boyle M'Master, who died in 1889, in his father's lifetime, leaving a widow and four children him surviving. Three of these children are still living, two of full age and the other a minor. They, and Mrs. Duffield, are now the only living lineal descendants of Maxwell M'Master. The contest is between the children and representatives of John Boyle M'Master, the son of George, who claim under a gift to the children of George contained in Maxwell M'Master's will, and the representative of William M'Master, a nephew of the testator, who claims under a gift over in the same instrument, contending that no child of George could take unless he survived his father. By his will Maxwell M'Master gave certain property in trust for his daughter Isabella for life, and after her death, in default of her children, in trust for his son George, in case he *should then be living*, and in case he should not be then living, in trust for *the children of his son George then living*, in equal shares, and if but one child, then for such child, and in case there should not be any children or child of his said son George *then living*, in trust for his nephew William M'Master. This appears to be a provision without ambiguity, and the condition of surviving both George and Isabella appears to be an essential qualification, and part of the description of the children

(1) 39 Ch. D. 426. (2) 13 A. C. 294. (3) 17 L. R. Ir. 279.

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of George who alone can take on Isabella's death without children. Counsel for the appellant relied upon this; but we have not to deal with the property comprised in this gift, and I cannot see that the fact of the testator's having given some property to such children only of George as survive George and Isabella, raises any presumption of an intention to limit a disposition of other property, contained in his codicil, and expressed in different terms, to children of George who satisfy the same condition.

The codicil which we have to construe deals with property in which, by the will, he had given an absolute interest to his son George. The codicil recites his desire to limit George's estate and interest to an estate and interest for his life only, and to declare the further trusts thereof which are thereinafter mentioned. It revokes the will so far as concerns the devise and bequest to George, and the codicil then devises the property to trustees to pay the rents, profits, and income to George and his assigns during his natural life, or until he shall become bankrupt or insolvent, and from and after his decease, bankruptcy, or insolvency, to pay the same rents and produce to Ellen, wife of George, during her life, for her sole and separate use without power of anticipation.

Then follows the clause which is the mainstay of the appellant's argument. It is in these words:—

> "And in case there be any child or children of my said son, George, living at the time of the death of them, my said son, George, and Ellen, his wife, or at the other period hereinafter contemplated."

This alternative period is defined to be "from and immediately after the decease of Ellen, and the bankruptcy or insolvency of George."

Before reading the gifts over, I point out that this clause is merely a description of an event, it gives no indication of the class of objects to take in that event. It certainly describes a contingency upon which something is to happen, but when we read on, we find that this something is only a power of appointment, and among the efforts which Courts have already successfully made to avoid defeating objects to whom the settlor stands in parental relation, is the refusal to carry forward a contingency

upon which a power is to arise into the qualification of the objects who may take under the power.

Furthermore, we have here a double—or rather a treble—contingency, and if it affects the class of objects at all, it must exclude not merely all children of George who fail to survive both George and Ellen, but also all children who are not born before his bankruptcy, whether that event occurs before or after the death of Ellen, or who fail to survive it, whenever it happens.

Lastly, I observe that, in strict grammatical construction and juxta-position, this contingent clause introduces, not any direct gift, but only a power of appointment, and if I were driven to it I should hold, with the Master of the Rolls, that the contingency affected the power, but went no farther, and was not grammatically, or at all, imported into the gifts in default of appointment.

These are the words that follow :—

> "Then from and immediately after the decease of the survivor of them, my said son, George, and Ellen, his wife, or from and immediately after the decease of Ellen and the bankruptcy or insolvency of George, the said property, and the interest and produce thereof, shall remain and be in trust for *all and every, or such one or more exclusively, of the others* or other of the children or child of my said son, George, by his present or any future wife, with such provisions for their respective maintenance, education, and advancement, or at such ages, days, or times, and, if more than one, in such shares and proportions, and in such manner, as my said son, George, shall by deed or will limit or appoint."

The Master of the Rolls appears to concede that the introductory words of contingency limited George's power of appointment, though he held that they did not limit the gifts over in default of appointment. I do not make this concession. In my opinion the cardinal question is—"Who were the persons whom the testator made objects of George's power of appointment?" They were "all and every the children of George, by his present or any future wife." There is no referential word—"*such*" for example—and there is no limitation of the words "all and every the children of George," which describe the objects of the power. Is it possible to exclude children of George by Ellen, or by a future wife, born after he had become bankrupt? Is it possible

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to exclude a child surviving George, but dying in the lifetime of Ellen? Is it possible that, if Ellen were now living, and George had died thirty years ago, having appointed the property to John Boyle M'Master on his marriage, the property would go over to collaterals on Ellen's death?

The effect to be given to powers of advancement has been referred to in many cases, especially in *Leader's Estate* (1). As a matter of fact, an appointment and settlement were made on John Boyle M'Master's marriage on November 29, 1877, twenty-eight years ago. Is it possible that provisions so made, or that advancements out of capital which might have been made under this power, were defeated by the death of John Boyle M'Master in 1889, and that all similar provisions for other children, or for John B. M'Master, would have been equally defeasible, though the appointees survived George, George never having become bankrupt, if Ellen had survived him, and her children had failed to survive their mother also? Are not these results of introducing the contingency into the exercise of the power rendered grotesque by observing that, on the words of the power, if any one child survived both George and Ellen, his survival would qualify all his brothers and sisters as appointees, though they might all have predeceased their parents, and appointments to them would be rendered indefeasible by the survival of some scapegrace to whom George had appointed nothing?

The gift over in default of appointment is in the following words:—

> "Then in trust for all and every *such* the children and child of my said son, George, *who* being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or day of marriage."

"*Such*" comes in here for the first time, the immediately preceding mention of George's children is not so qualified: "all and every the children or child of my said son George by his present or any future wife" are first mentioned, and "such" comes in with twenty-one or marriage, and limits the division of

(1) 17 L. R. Ir. 279.

the property *under the gift over* to sons at twenty-one, daughters at twenty-one or marriage, if more than one in equal shares, *and in case there shall be only one child*, then the whole for such one or only child. What can this mean but "the only child of my son George"? Assuming that there was no appointment, or that the contingent power of appointment never arose, what is there to prevent John Boyle M'Master from taking under the very words of this gift? He was the only child of George: he attained twenty-one, he married, and he has children living.

Furthermore, the trustees are empowered after the deaths of George and Ellen, or the death of Ellen and the bankruptcy of George, and until the whole of the trust property shall become vested in *such* child or children, to apply the income of the trust property for the benefit of *all and every of the children* or child for the time being entitled thereto in expectancy. In their grammatical construction, in their natural sense, and on the principle of interpretation which the authorities, since 1749, have favoured as according with the probable intention of a settlor holding the parental relation towards the objects of his bounty, these provisions include every child of George attaining twenty-one or marriage, and cannot depend upon the contingency that some one child of Ellen will survive both parents.

The gift under which the appellant claims takes effect only "in default of such child or children of my said son George." As George had a son, and that son attained twenty-one, in my clear opinion this ultimate gift over never took effect, and the judgment of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

A question was raised at the Rolls, and by the notice of appeal, as to a sum of £4000, balance of an indemnity fund mentioned in the will. Our decision on the main question deprives the appellant of any interest in this sum, and we understand that the respondents *inter se* do not ask us to reconsider the decision of the Master of the Rolls upon it.

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WALKER, L.J.:—

This is one of a very numerous class of cases raising a question whether a child of a testator or settlor to whom the settlor stood *in loco parentis* had attained a vested interest in his portion when he attained twenty-one, though he died subsequently in the lifetime of his parent.

It would be a profitless task to attempt to go through the wilderness of cases which have arisen on this point, and especially so, because in every case the Court is in result remitted, subject to the application of some general rules incident to the character and object of the instrument in question, to the construction of the instrument itself as a whole.

There are in some cases difficulties in the way of treating the gift as vested which in the present one do not exist. The existence of the fund itself is not contingent, and further, the testator has not made any actual provision for the issue of the child if it does not survive any given period. It is settled also that a will of a testator *in loco parentis*, which provides portions for a child or children, is subject to the same rules of construction as a settlement: *Jackson* v. *Dover* (1); and it is clear that in the present case the testator stood *in loco parentis* to the children of his son, George M'Master. I shall take the statement of the general rule from two cases: *Howgrave* v. *Cartier* (2), which may be said to be the leading case, and *Whatford* v. *Moore* (3), where the decision upon a different set of clauses was against the vesting. In the first, Sir William Grant says:—"The sort of question, that arises in this case, has so frequently occurred of late, that there is no great difficulty in collecting the law upon it. If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously only expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which or the contingency upon which the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that

(1) 2 H. & M. 209. (2) 3 V. & B. 85. (3) 3 My. & Cr. 270.

child stands in need of a provision; usually as to sons at the age of twenty-one; and as to daughters at that age, or marriage."

In *Whatford* v. *Moore* (1) Lord Cottenham said:—"In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children, so dying, as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object; but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them." Later on he says:—"The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule which has been generally recognized of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but, if not, to give effect to the plain meaning of the words used."

The question of course would never arise if there were not a clause in the instrument which, taken by itself, appears to make the vesting dependent upon the contingency of the child surviving the parent; and if we find the will consistently throughout so limiting the gift, we cannot by any forced or arbitrary construction raise the implication of the intention, which, in the absence of plain language, we could attribute to the settlor. This would be the vicious circle condemned by Lord Halsbury in *Leader* v. *Duffey* (2). Lord Hatherley in *Jackson* v. *Dover* (3) expresses the same view when he says, "You look for an intention to give provisions where they are wanted, and in case of doubt you give the benefit of the doubt in favour of vesting, only you must not first create the doubt itself."

I may add that the exposition of the general principles contained in the admirable judgments—if I may respectfully speak of them—in *Leader's Estate* (4) of the Lord Chief Baron, Lord Justice Fitz Gibbon, and the dissenting Judge, Naish, L.J., leave nothing to be desired. In result, that case was decided in the House of Lords on the grammatical construction of the words "issue then in being," without recourse to any of the principles adopted in *Swallow* v. *Binns* (5), to which I shall refer later.

(1) 3 My. & Cr. 289. (2) 13 A. C. 294. (3) 2 H. & M. 209.
(4) 17 L. R. Ir. 279. (5) 1 Kay & J. 417.

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With these observations I approach the consideration of the instruments in this case, *i.e.* the will and codicil, taken together, of Maxwell M'Master. I am far from saying that there may not be introductory words preceding gifts to children, and gifts over in default of children, which are not only expressive of the event of survivorship, but project a contingency on that event into all gifts that follow; but in order to see if they have such a far-reaching effect as against the intentions which one would expect to be expressed in such a will, we have to see whether they are really meant to ascertain for all purposes and in all events the existence of a contingent class; and to test that we are obliged to compare them with the actual gifts to the children whether operating through the exercise of a power, or given by a trust in default of appointment, and also especially with the gift over in default of children under which in this case collaterals claim; and if we find all these gifts themselves free from contingency expressed actually or referentially by the use of "*such*" or similar words, then the instrument as a whole will not make "clearly and unequivocally" the rights of the child depend upon its surviving both or either of its parents.

So far as regards the will, there can be no doubt suggested as to its effect. The testator had a son, George, and a daughter, Isabella Duffield, and he had, amongst other properties, valuable house property and building ground situate on the west side and also on the east side of Rathgar-road. He gives by his will, which bears date in 1863, the said property on the west side to his son George absolutely; but as regards that on the east side he puts it in settlement with certain other property in trust for his daughter for life, and after her decease for her child or children as her daughter should by deed or will appoint, and in default for her children, sons at twenty-one, and daughters at twenty-one or marriage, and to be a vested interest in them at these periods, and in default of such child or children of Isabella, then in trust for his son George absolutely, "in case he shall be then living," "and in case my said son George shall not then be living, in trust for the children of my son George then living, in equal shares, and if but one child, then for such child, and in case there shall not be any children or child of my said son George then living, in trust for my

nephew William M'Master, his heirs, executors, administrators, and assigns"; and he directs that his residuary property shall be divided into five parts, and three-fifth parts thereof be transferred to his son George absolutely, and the remaining two-fifths be held in trust for the same purposes as declared of the lands on the east side of Rathgar-road and other property given in trust for his daughter and the other persons thereinbefore mentioned.

George M'Master had thus under the will an absolute interest in the property on the west side of Rathgar-road, and in the three-fifths of the residue; and in the property given to the daughter and her children George and his children had also contingent absolute interests, dependent upon their being living when the gifts to them respectively took effect.

He is here not making a settlement on George, but making direct gifts to him or his living children in case of the failure of the settlement made in his daughter's case; and under the settlement made for her, her children undoubtedly would take vested interests at twenty-one or marriage.

He made a codicil on the 6th December, 1864, the main object of which was, as he states, to limit the estate of George in the lands and three-fifths of the residue to an estate for life only, and to declare further trusts thereof after mentioned. Accordingly he revokes those absolute gifts, and gives the property to trustees upon trust to pay the income to George for life, or till bankruptcy or insolvency, and after the happening of any of these events, to his wife Ellen for life, for her separate use; and the codicil then proceeds—"And in case there be any child or children of my said son, George, living at the time of the death of the survivor of them, my said son George, and Ellen his wife, or at the other period, hereinafter contemplated, then from and immediately after the decease of the survivor of George and Ellen his wife, or from and immediately after the decease of Ellen and the bankruptcy or insolvency of my said son, George," trusts are declared of the lands and three-fifths of the residue in the following words—"in trust for all and every or such one or more exclusively of the others or other of the children or child of my said son George by his present or any future wife, with such provisions for their respective maintenance, education and advancement, or at such ages, days or times, and if

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more than one in such shares and proportions and in such manner as my said son George shall by deed or will limit or appoint," and in default and so far as same shall not extend, "then in trust for all and every such the children and child of my said son George, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or day of marriage," and "in case there shall be only one child then the whole for such one or only child."

It is to be observed that in the description of the objects of the power there is no word "such" used, or any other word carrying a supposed contingency, and George had power to make an appointment to any child to be vested at any named period, and to give directions for advancement out of capital. This was a main determining factor in *Howgrave* v. *Cartier* (1). It is said though he could do all that, every appointment would be defeasible if the appointee died in the lifetime of himself or his wife—a construction certainly to be struggled against. It happened in this very case, for George appointed to his son on his marriage to be a vested interest immediately.

The Master of the Rolls has pointed out that if George became a bankrupt in the life of Ellen, and Ellen died and he married again and had children, the clause on which the plaintiff relies would not meet the case of the second family, and yet provision is made for children by any future wife, and he is given an exclusive power under which he could select one of them exclusively.

Then the gift in default of appointment is clear in favour of all the children and child of George, by any marriage, who attain twenty-one or marry. The word "such" there is plainly by his present or any future wife, "and in case there shall be only one child then the whole for such one or only child," *i.e.*, any only child, by any marriage, who attains twenty-one or marries shall take. But the gift over under which the appellant claims is, taken by itself, absolutely clear: "and in default of such child or children of my said son George, then in trust for the persons and to and for the uses, intents, and purposes in my said will named, expressed, and declared, concerning the lands by my said will given in trust

(1) 3 V. & B. 79.

for my daughter Isabella and the other persons therein mentioned." That is in result for the appellant. The word "such" has the same meaning as in the gift to the only child, so that this gift over on which the appellant relies is, standing by itself, clear that his title does not arise if a child of George attained twenty-one.

The case of *Swallow* v. *Binns* (1) seems to me a much stronger one than the present. It will be observed that the words of contingency, stated by Lord Hatherley to be clear, were contained in the very gift to the children, and were only got rid of by the language of the gift over. The property was settled in that case by the settlor in trust for his son George Binns for life, and after his death in trust for all George's children who might be living at the time of his decease as tenants in common; and if George should have but one such child, then for such only child; the share of every *such* child to be vested at twenty-one, or if a daughter, at twenty-one or marriage, with a proviso for survivorship, and *in case all such of George's children as were sons should die under twenty-one*, and all such of them as were daughters under that age without having been married, then over. Lord Hatherley, in giving judgment, said (at p. 432)—"I come now, however, to the second clause, to which I have adverted as a clause of very considerable importance—in fact, the turning clause in the case. It is in these words: 'Provided always, that in case all such of the children of the said George Binns as are sons shall die under the age of twenty-one years, and all such of them as are daughters under that age without having been married,' then the property is to go to other parties by way of gift over. That clause, unless there be some other peculiarity to overrule its effect, brings the case within the decree made by Sir John Leach in *Perfect* v. *Lord Curzon* (2), and which he followed in *Torres* v. *Franco*" (3). He then refers to some passages in the judgments of Sir John Leach in those two cases; and continues thus:—"Such being the rule adopted by Sir John Leach, the question is whether there is anything in this settlement to exempt it from the operation of that rule. During the hearing I confess that I had some doubts as to which way the argument preponderated. But I do not think

(1) 1 K. & J. 417. (2) 5 Madd. 442. (3) 1 R. & M. 649.

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that any doubt of mine upon other clauses in this settlement should overrule the effect of the clause comprising the limitation over, which, according to Sir John Leach, makes it necessary for me to infer that children are not to be excluded in consequence of their not having survived their parents." He concludes by saying:— "In conclusion, therefore, I consider that, having regard to the terms of the limitation over after the trusts in favour of the children of George Binns, I am bound by the decision in *Perfect* v. *Lord Curzon* (1), and by the more recent decision in *Torres* v. *Franco* (2), and it does not seem to me that there is anything so certain or determinate in the subsequent limitations as to induce me to say that they raise any doubt which ought at all to countervail the force of the operation of those decisions."

Here we have the language of the power of appointment and power of advancement, the gift in default of appointment, and finally the gift over; elements stronger than existed in *Swallow* v. *Binns* (3). The authority of *Swallow* v. *Binns* (3) has never been questioned. It was recognised in the House of Lords in *Wakefield* v. *Maffett* (4), and what we have in conflict here is not a gift, but a prefatory declaration, not complete in itself, and probably introduced either by a blunder, or, as was said in *Currie* v. *Larkins* (5), to emphasize the necessity of the life estates being preserved. At all events, I think, if the rule in *Swallow* v. *Binns* (3) is to be applied at all, it should be applied in the present case, and that the appeal must be dismissed.

This will, in effect, render unnecessary the consideration of the question as regards the £4000, and I concur with FitzGibbon, L.J., in what he has said on that point.

HOLMES, L.J.:—

If a marriage settlement, or testamentary dispositions, like those in this case, clearly and unequivocally throughout all the provisions make the right of a child depend upon its surviving its parents, then a Court of Equity has no authority to control such a disposi-

(1) 5 Madd. 442.
(2) 1 R. & M. 649.
(3) 1 K. & J. 417.
(4) 10 A. C. 422.
(5) 4 De G. J. & S. 245.

tion; but if the provisions are ambiguously expressed so as to leave it uncertain whether it was intended that the right of the child should depend upon its surviving its parents, then the Court is bound to declare upon what may be called the presumed intention in instruments of this nature that the interest of a child, though not to take effect in possession until after the death of its parents, did vest in sons at the age of twenty-one, and in daughters at the age of twenty-one or marriage. The foregoing principle of law I have stated substantially in the words of Sir John Leach in *Perfect* v. *Lord Curzon* (1); but it is to be found expressed in similar language in several authorities. Many of them were carefully considered in this Court in *Leader's Estate* (2); and to examine them now in detail would be to repeat what has been already done by distinguished Judges. It is only necessary to apply this rule of law to the will and codicil of Maxwell M'Master which the Court is called on to construe, and which, in my opinion, furnish good illustrations of both branches of the proposition, namely, of a gift given in clear and unequivocal terms, and of a gift doubtfully and ambiguously expressed. The first is to be found in the will where the testator gives certain property therein described to trustees in trust for his daughter Isabella for life, and after her death to such of her children as she should by deed or will appoint, and in default of such appointment for Isabella's children who, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry. I have given succinctly the effect of the foregoing dispositions. They are expressed in the usual technical and elaborate language which it is unnecessary to set forth verbatim, inasmuch as there can be no doubt as to the meaning and intention. Then follow these words: "and in default of such child or children of my said daughter Isabella, then in trust for my son George, his heirs, executors, administrators, and assigns, in case he shall then be living, and in case my son George shall not then be living, in trust for the children of my son George then living in equal shares, and if but one child then for such child, and in case there shall not be any children or child of my said son George then living, in trust for my nephew William M'Master."

(1) 5 Madd. 442. (2) 17 L. R. Ir. 279.

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Here we have perfect precision of language. I cannot tell why the testator, in the event of Isabella dying without issue, and of George and his children having died in her lifetime, gives the property to his nephew to the exclusion of George's grandchildren; but the language used can bear no other construction, and the law carries out, as a matter of course, what is thus clearly expressed.

I come now to the first codicil with which we are chiefly concerned, and which is in contrast to the lucidity of the will. The testator by his will had given certain gifts absolutely to his son George. These gifts he revokes by the codicil; and instead thereof he gives the property so devised and bequeathed to trustees in trust for George for life, or until he shall become bankrupt or insolvent, and after the termination of this estate in trust for Ellen, the wife of George for life. There then follow these words—"In case there be any child or children of my said son George living at the time of the death of the survivor of them," George and Ellen, "or at the other period hereinafter contemplated, then from and immediately after the decease" of such survivor, "or from and after the decease of the said Ellen, and the bankruptcy or insolvency of George," the said property "shall remain and be in trust for all and every, or such one or more exclusively of the others or other of, the children or child of my said son George by his present or any future wife, with such provisions for their respective maintenance, education, and advancement, or at such ages, days, or times, and if more than one, in such shares and proportions, and in such manner, as my son George shall" by deed or will appoint.

Now, there is, I think, a manifest ambiguity, if not inconsistency between the opening limitation of the power of appointment and the description of its objects, and of the mode in which it is to be exercised. In the first part of the sentence the power is only to be effectively exercised in the event of there being children surviving at the period named; but in the last part of the clause, the appointment may be made in favour of all or any of George's children at such age as he may appoint. I cannot limit the objects of the power to children that will survive; and such a construction has not been seriously argued. It is, however, said that the appointment will only be operative if there is a surviving child, but that in such case all other children, although then dead,

in whose favour the power had been exercised would be held to have taken vested interests. This construction seems to me to be inconsistent with the part of the sentence that describes the manner in which the power may be exercised, and indeed borders on absurdity. I am disposed to think that according to some of the authorities the opening words ought to be struck out altogether; but as there was no appointment, it is unnecessary to decide this, and I accept for my present purpose the construction proposed by the appellant, following in this respect the Master of the Rolls. But then comes the limitation in default of appointment—"in trust for all and every such the children and child of my said son George who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or day of marriage, to be divided amongst such children if more than one in equal shares and proportions as tenants in common, and in case there shall be only one child, then the whole for such one or only child." I find it impossible to introduce into this limitation a proviso that it is only to take effect in the event of there being a surviving child. To do so would, in my opinion, be in direct opposition to the legal principle which is the basis of my judgment, and could only be done if the presumed intention of an instrument of this kind is that the interest of a child is only to vest in the event of the child surviving the parent, the very opposite of the recognised rule of law.

Having thus stated my view of the principal subject of this appeal, I do not think it necessary to add anything on the second point to what has been said by the Master of the Rolls, with which I agree.

Solicitors for Mrs. Duffield: *Richardson & Synott.*
Solicitors for John Maxwell M'Master: *Henry & Son.*
Solicitors for Wm. De Groot and Eleanor M'Master: *Thomas O'Connell & Son.*
Solicitors for Angelo Fahie, W. G. Armstrong, and J. R. Redding: *Hoey & Denning.*

R. D. M.

Ross, J.
1906.
March 26.

IN THE MATTER OF THE ESTATE OF MARTINA FINNEGAN AND BARTHOLOMEW FINNEGAN, OWNERS; THE REV. WM. JOSEPH CLARKE AND OTHERS, PETITIONERS.

Statute of Limitations—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Mortgage—Presumption of payment of interest by owner of portion of lands, being also owner or tenant for life of the mortgage—Effect of such payment as to the remaining portion of the lands.*

A fictitious payment presumed to have been made by the owner of an undivided portion of lands charged with a mortgage to himself, as owner or tenant for life of the mortgage, is not sufficient to prevent the Statute of Limitations from running in favour of a third party, owner of the remaining undivided portion.

A mortgage for £1300, charged on leaseholds and other lands, became, in 1827, vested in the owner of three-fourths of the leaseholds. From 1827 to 1850 no actual payment of interest on foot of the mortgage was made by anyone :—

Held, that, by the 8th section of the Real Property Limitation Act, 1874, the mortgage debt was barred as against the remaining fourth of the leaseholds.

RE-ENTRY on Examiner's report.

Luke Stritch, being tenant for life of an undivided moiety of certain freehold premises, and also of certain leasehold premises held for a term of 999 years, all in the city of Dublin, purchased the other moiety of the premises, and died intestate in the year 1820. Both moieties of the premises were then subject to a mortgage for £1300, dated 6th June, 1792. He was succeeded, as to the moiety of all the premises of which he was tenant for life, by his brother, William Luke Stritch, as tenant for life. As to the moiety which he purchased, his brother, William Luke Stritch, became entitled, as his heir at law, to the freehold portion thereof; his said brother and his sister, Lucy Monsanto, otherwise Stritch, became entitled to the leasehold portion equally, as his next-of-kin. William Luke Stritch married in the year 1825, and his wife's fortune was put in settlement. The trustees of his settlement obtained a transfer of the mortgage for £1300, by

indenture dated 15th January, 1827, and the interest thereon became payable to his wife for life, then to William Luke Stritch for life, and in default of issue, and in the event of William L. Stritch surviving his wife, which events happened, the principal of the mortgage vested absolutely in William L. Stritch. No actual payment of interest on foot of the mortgage was ever made to the trustees of the settlement after the transfer of January, 1827. Lucy Monsanto, otherwise Stritch, died in the year 1850, and no payment of interest was ever made by her. William Luke Stritch died on the 1st July, 1858, having made a will, dated 8th March, 1858, by which he devised all his interest in said lands, and also his interest in said mortgage, to which he was then absolutely entitled, but which still remained vested in the trustees of his marriage settlement, to his niece, Martina Monsanto, daughter of Lucy Monsanto, for her life, with remainder to her children equally. Martina Monsanto married Bartholomew Finnegan, and had issue two children, and died intestate on the 12th July, 1895. On a reference to the Examiner to find the priorities of the mortgages affecting the lands, and what portions of the property were respectively charged thereby, the Examiner found that the mortgage for £1300, dated 6th June, 1792, was still subsisting, and was a first charge on all the freehold and leasehold premises. On that report coming up for further consideration, it was contended that as no interest was paid on foot of the said mortgage by Lucy Monsanto, who was entitled, as aforesaid, to half an undivided moiety of the leasehold premises as next-of-kin of Luke Stritch, deceased, from the year 1827 up to the date of her death in the year 1850, the Statute of Limitations applied to that portion of the leasehold premises, and that the mortgage was no longer a charge on Lucy Monsanto's half of the said moiety.

Section 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), is as follows:—"No action or suit or proceeding shall be brought to recover any sum of money secured by any mortgage . . . but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been

Ross, J. 1906. *In re* FINNEGAN'S ESTATE.

given in writing, signed by the person by whom the same shall be payable."

Jellett, K.C., for the petitioners :—

Under section 8 of the Act of 1874 payment by a person liable to pay would affect the other persons liable to pay, but a mere presumption of payment, as in the present case, would not keep alive the mortgage : *In re England* (1) ; *Bassett* v. *Allen* (2) ; *Topham* v. *Booth* (3).

Brunskill, for the first incumbrancer :—

Where the same person is owner of lands, and also owner or tenant for life of a mortgage on the same lands, the law presumes an actual payment of interest. This case is within the principle of *Chinnery* v. *Evans* (4). In *In re England* (1) there were two distinct securities for the debt, the charge on the lands and the personal covenant. The claim was held barred against the personal estate, but the charge on the lands still remained. Suppose Blackacre and Whiteacre charged with £1000 : Blackacre sold to A, with an indemnity given that Whiteacre should pay the interest on the charge; Whiteacre devised to B, who is also tenant for life of the mortgage of £1000. On B's death, could it be contended that the mortgage was barred against Blackacre because B in his lifetime, for more than twelve years, did not pay to himself interest on the mortgage ?

[Ross, J. : Undoubtedly the mortgage would be gone.]

Ross, J. :—

My opinion now is the same as that expressed by me when the report of the Examiner first came before me. The 8th section of the Real Property Limitation Act, 1874, does not take into account constructive payment. No mere constructive payment of interest is sufficient to keep a charge alive when the hand to receive is not the same as the hand to pay. In the hands of Lucy

(1) [1895] 2 Ch. 100.
(2) [1898] 2 Ch. 499.
(3) 35 Ch. D. 607.
(4) 11 H. L. Cas. 115.

Stritch her fourth, from the year 1827 to the year 1850, remained free from any acknowledgment of the mortgage debt. The mortgage is therefore barred as to her fourth, and the Examiner's report must, accordingly, to that extent, be varied.

Solicitors for the petitioners having carriage: *Collis & Ward.*
Solicitors for the first incumbrancer: *Carruthers & Gamble.*

D. M. S.

PALMER AND OTHERS *v.* BYRNE.

Barton, J.
1906.
Feb. 23, 28.
March 10.

(1904. No. 1112.)

Landlord and tenant—Sporting rights—Judicial tenancy—Reservation to landlord of exclusive right of fishing—Natural obstruction thereto—Remedies of landlord as to removal of same.

The exclusive right of fishing in a river, where it flowed past the holding of a judicial tenant, was reserved to the landlord by the order fixing the fair rent. Some sallies and thorn-bushes were growing in portion of the river bank, so as to prevent fishing unless cut and lopped from time to time. Their only use to the tenant was the stability which their roots gave to the bank. The practice had always been to cut them from time to time, so as to prevent interference with the fishing; and the normal and reasonable condition and user of the bank, prior to and at the date of the aforesaid order, had been such as to enable the landlord to exercise his right of fishing and at the same time to maintain the stability of the river-bank. After the fixing of the fair rent the sallies and bushes grew to a height which rendered impossible the reasonable exercise by the landlord of his right of fishing. The tenant refused to cut them, or to allow the landlord to do so:—

Held, that the landlord had a right of entry for the purpose of cutting the sallies and bushes, so far as might be necessary for the reasonable exercise of his fishing rights, but so as not to interfere with the stability of the bank.

Held, also, that in the circumstances of the case the landlord was not entitled to a decree having the effect of a mandatory injunction to compel the tenant to cut the sallies and bushes; but that his remedy was to enter and cut them, if the tenant did not do so.

TRIAL OF ACTION.

By his will, dated 20th April, 1903, part of the lands of

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Derryclooney and Hymenstown, containing 102A. 0R. 9P., was, *inter alia*, devised by Alexander Going, late of Altavilla, Cahir, in the county of Tipperary, who was owner in fee thereof, to the plaintiffs as trustees, upon the trusts therein mentioned.

The defendant was the judicial tenant of the said lands under an order of the Irish Land Commission, dated the 10th October, 1893, whereby the rent was fixed at £90. It was certified by this order that the right of fishing and taking fish should belong exclusively to the landlord.

The River Suir flowed over and by part of the said holding in possession of defendant as aforesaid, and the fishing and fishing rights in that part of the river were alleged by plaintiffs to be valuable. At the date of the said order of the Irish Land Commission, certain sallies, shrubs, and thorn-bushes were growing on the portion of the defendant's holding bordering on said river, which had, at the time of action, grown into such a state as to interfere with and obstruct plaintiff's fishing rights.

Before action brought, the plaintiffs, by letters and notices and finally by a notice dated August 13th, 1904, called upon defendant to properly lop these sallies and thorn-bushes, so as to prevent hindrance and obstruction to the said fishing, or to send a written permission to the plaintiffs to enable them to lop them themselves. The defendant did not lop the sallies and thorn-bushes, or give the plaintiffs permission to do so.

The plaintiffs claimed an injunction to restrain the defendant from permitting or allowing these sallies and thorn-bushes to remain in such a condition as to constitute a nuisance and hindrance to their right of fishing; and also an order directing defendant to put and keep the sallies and thorn-bushes in such a condition as not to interfere with or obstruct their right of fishing.

The evidence, so far as material, appears from the judgment of BARTON, J.

Gordon, K.C., and *Corvan*, for the plaintiffs:—

The tenant must keep the property in such a condition as not to interfere with the landlord's right of fishing; and he cannot interfere with the landlord's enjoyment of his right by allowing

these shrubs and bushes to grow to such a height as to obstruct the exercise of the right of fishing, whether the bushes were there at the time of the fixing of the fair rent or not, and a mandatory injunction will lie to restrain him from doing so: *Lane* v. *Newdigate* (1), where the defendant was restrained from hindering the enjoyment of the plaintiff by keeping works out of repair which were in existence at the date of the lease: *Kilmorey* v. *Thackeray*, referred to in *Bathurst* v. *Burden* (2); *Blakemore* v. *Glamorganshire Canal Navigation* (3). The injunction sought here is not an injunction to compel the tenant to lop and cut, but to restrain him from permitting shrubs and bushes to grow to such a height as to cause an obstruction to plaintiffs' right, which, of course, would entail cutting and lopping. Previous to the Land Commission order, these sally trees and bushes were kept down by the defendant. Sally trees do not grow without being planted, like grass, and whether they were planted before or after the grant, makes no difference. In fact, the defendant alleges that he keeps these trees as shelter for his cattle and to secure the stability of the river-bank. [They also cited *Boyle* v. *Holcroft* (4) and *Smith* v. *Baxter* (5).]

Molony, K.C., and *Poole*, for the defendants:—

Lane v. *Newdigate* (1) is the sole authority that gives any colour to the plaintiff's contention. *Kilmorey* v. *Thackeray* (2) is disapproved of in *Ryan* v. *Mutual Tontine Westminster Chambers Association* (6): see page 124 of the report. Moreover, there the defendant took some active step, not as here where the defendant has done nothing. There is a clear distinction between a case of active interference and a case like the present, where the obstruction is caused by sallies and thorn-bushes, which grow wild, like grass. Here the grant is under the fair-rent order, and these sallies and bushes were there at the date of the order, and there is no easement compelling the servient owner to do anything. In cases like *Boyle* v. *Holcroft* (4) and *Smith* v. *Baxter* (5) there was active interference on the part of the defendants, and they are

(1) 10 Ves. 192.
(2) 2 Bro. C. C. 63, at p. 64.
(3) 1 M. & K. 154.
(4) [1905] 1 I. R. 245.
(5) [1900] 2 Ch. 138.
(6) [1893] 1 Ch. 116.

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therefore distinguishable on this ground. The sallies and thorn-bushes are necessary for the stability of the river-bank.

BARTON, J.:—

March 10.

Plaintiffs are owners in fee, and defendant is judicial tenant, of a holding on the banks of the river Suir. By the order of the Land Commission fixing the fair rent, which was made in 1893, it was certified that the right of fishing and taking fish should belong exclusively to the landlord.

The case is concerned with the rights and obligations *inter se* of plaintiffs and defendant, respectively, in regard to the cutting and lopping of some sallies and thorn-bushes, which, prior to and at the date of the order fixing the fair rent, were growing along a portion of the river-bank. I need hardly observe that every case of this kind must turn mainly upon its special facts and circumstances. In the present case it happens that these riverside lands had been previously held under a lease, dated in 1863, under a reservation in which the exclusive right of fishing had been held and enjoyed by the landlord. I do not understand plaintiffs' counsel to have relied upon the reservation in the old lease, save in so far as the acts and conduct of the parties under it afford evidence as to the usual and reasonable condition of the *locus in quo*, both before and at the time of the fixing of the fair rent, and the ordinary and regular user of the place by the parties. It is admitted that the only use of these sallies and shrubs to the defendant is the stability which their roots give to the river-bank, and that the cutting of them to a reasonable height, so as not to interfere with the fishing, does not injuriously affect any right of the tenant in the management or cultivation of his farm. The sallies and bushes have been growing in the bank as long as any living witness can remember, and they have always been kept at a reasonable height, so as not to interfere with the fishing. That has been and is the ordinary and reasonable way of keeping the bank and working the farm at this place. The cutting and lopping was sometimes done by the tenant, but more frequently by the owner or lessee of the fishing, with the result that the usual and reasonable user and condition of the place at the date of the order fixing the fair rent was such as to enable the landlord at all

times to exercise his right of fishing at this spot. Recently, however, these sallies and bushes have been allowed to grow to a height which renders impossible the reasonable exercise of the right of fishing; and the defendant has refused either to cut them himself, or to allow the landlord to do so.

Under these circumstances, the plaintiffs are, in my opinion, entitled to relief. They are only asking to have the bank at this spot maintained in its reasonable and normal condition, so as not to interfere with the right which has been granted to them; and they are not seeking to interfere with any right of the tenant as to managing and cultivating his farm. At the close of the case, defendant's counsel acquiesced in the view that the plaintiffs have a right to keep the sallies and bushes cut and lopped so far as may be necessary for the reasonable exercise of their right of fishing, but so as not to interfere with the stability of the river-bank. A right—limited in that way—seems, in the circumstances of the present case, to be incidental to the grant to the landlord of the right of fishing, and not to conflict with any right of the tenant.

The arguments were mainly concerned with the question of the form of relief to which plaintiffs are entitled. They claim an injunction to restrain defendant from permitting the sallies and bushes to become an obstruction to the fishing. That would be a form of decree hardly distinguishable from a mandatory injunction to compel the defendant to cut them. I do not think that they are entitled to an order of that kind. If the defendant, after the date of the reservation of the fishing right, had planted these sallies and bushes so as to be or become an obstruction to the fishing right, different considerations might arise. I express no opinion upon a state of facts which is not before the Court. In this case these sallies and bushes were growing on the bank before the date of the order which fixed the fair rent and reserved the fishing right, and I infer that they were growing there before the commencement of the old lease of 1863. The obstruction which they cause is not the result of any act, still less of any misfeasance, on defendant's part. If they grow from time to time in the ordinary course of nature to such a height as to be an obstruction to the fishing, there is, in my opinion, no active obligation upon him to take upon himself the responsi-

Barton, J. 1906.

PALMER v. BYRNE.

bility and expense of cutting and lopping them for plaintiff's benefit. But if he does not choose to cut and lop them himself, there is a negative obligation upon him, in the circumstances of the present case, to permit plaintiffs to do so. There remains the question of the costs. The plaintiffs, in asking for a mandatory injunction, claimed a larger relief than they are entitled to. But defendant, both before the trial, and in his evidence at the trial, denied that plaintiffs had any rights in the matter. Under the circumstances I must order the defendant to pay plaintiffs' costs incurred subsequent to his defence.

The order will be as follows:—

"THE COURT doth declare that the plaintiffs and their agents and servants are entitled to enter upon the lands of Derrycloonev and Hymenstown, in the statement of claim mentioned, which are held by defendant from the plaintiffs, under an order of the Irish Land Commission, dated the 10th day of October, 1893, for the purpose of cutting the sallies, shrubs, and bushes growing in the banks of the River Suir, where it passes through said holding, in so far as same interfere with the reasonable exercise by the plaintiffs and their licensees of the right of fishing in said river reserved to the landlord by the said order of the Irish Land Commission, but not so as to interfere with the stability of the bank of said river."

Solicitor for the plaintiffs: *George H. Sargint.*
Solicitor for the defendant: *Charles M. Barry.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF THE REV. ROBERT WILLIAM RADCLYFFE DOLLING.

Meredith, J.
1906.
March 13.

Practice—Life annuity charged on lands sold under the Land Purchase Acts —Redemption price—Restraint on anticipation—Payment of capital sums to satisfy annuity.

Where, in land purchase proceedings, the redemption price of a life annuity, in respect of which the annuitant was restrained from anticipation, had been placed to a separate credit, and an application to have the restraint removed and the sum representing the redemption-price paid out to the annuitant had failed, on a further application that the Accountant-General be directed to invest the same, and pay the dividends thereon from time to time to the annuitant on account of her annuity, and each half-year to sell such amount of said stock as, together with the dividends received, would amount to half the annuity, and to pay the proceeds of such sale to the annuitant:—

Held, that, under the circumstances of the case, the application should be granted.

APPLICATION on behalf of Mary E. Radclyffe Staples, that out of the balance of the sum of £650 remaining in Court the Accountant-General do pay to the said Mary E. R. Staples the sum of £12 10*s.*, being the amount of the annuity payable to her from the date when the said sum of £650 was paid to a separate credit, and that the Accountant-General do invest the balance of the said sum of £650, and transfer the same to the credit of the matter and the said separate credit, and pay the dividends thereon from time to time to the said Mary E. R. Staples on account of her annuity of £50 a year, and do each half-year sell such amount of said stock as, together with the dividends received, will amount to £25, and pay the proceeds of such sale to the said Mary E. R. Staples.

Under and by virtue of the trusts of a settlement, dated 3rd August, 1883, and made between James Head Staples of the first part, Mary Emma Radclyffe Staples (therein called Dolling) of the second part, Nathaniel Staples of the third part, Michael King and Frederick Green of the fourth part, Mary E. R. Staples was entitled to an annuity of £50, charged on the lands sold in this

Meredith, J. 1906. *In re* DOLLING'S ESTATE.

matter, but was restrained from anticipation in respect thereof. On the lands being sold under the provisions of the Irish Land Act, 1903, the redemption price of the annuity of £50 had been fixed at the sum of £650, and the said sum had been placed to a separate credit.

An application by the annuitant, to have the restraint removed and the money paid out to her, had been refused, on the ground that it would not be for her benefit. The trustees were all along willing that the money should be paid out to her. The present application was accordingly made.

W. M. Jellett, K.C., in support of the application :—

The procedure which we ask the Court to adopt is analogous to that which was adopted in the Landed Estates Court in *Nicholson's Estate* (1). As the money has been retained in Court, the annuitant's rights are as pointed out by Flanagan, J., in that case. The annuitant is only asking to get what she has all along received. The procedure in an administration suit cannot be considered as analogous, as in this case the annuitant is being compulsorily redeemed. The annuitant has attained the age of sixty-three years, and the capital sum, exclusive of the dividends thereon, will be sufficient to pay her the full amount of the annuity for thirteen years.

MEREDITH, J. :—

I regret that I was not asked, when ruling the final schedule, to deal with this annuity under section 24 (4) of the Irish Land Act, 1903. If that sub-section is to be utilised at all in connexion with the distribution of purchase-money under the Land Purchase Acts, it would appear to me that it ought to be utilised in cases such as the present, where, owing to the annuitant being restrained from anticipation, the difficulty which has occurred in this case must necessarily arise. Had that course been taken, I, in accordance with the Act of Parliament, would have been justified in ordering that out of the purchase-money a capital sum should be set apart, sufficient, when invested in trust securities, to produce

(1) I. R. 11 Eq. 177.

an annual income of £50. I do not blame the parties for the course they elected to take. The special circumstances disclosed on the former application led the annuitant to hope that the restraint on anticipation would be removed, and that, if the annuity was redeemed in the ordinary way, the capital sum would be paid to her. But I desire to draw special attention to section 24 (4) for this reason, that it appears to me that the fairest way to deal with an annuity in respect of which the annuitant is restrained from anticipation is under that sub-section. There is an alternative course, which I have taken with the consent of the parties on more than one occasion in a case such as the present. Although the annuity has been redeemed, and the redemption-price fixed, I have, with the consent of the annuitant and of the trustees, purchased with the redemption-price an annuity secured by a deed, settled by myself, under the provisions of which the trusts affecting the annuity are executed by an insurance company, and the annuity paid during the life of the married woman. I see no objection to that course being adopted in the future as in the past, provided that the circumstances of the case justify the Court in fixing the redemption-price at such a sum as will enable the annuity to be purchased from a company approved of by the Court. In the present case a third method of dealing with the fund is suggested by counsel on behalf of the annuitant, and I am disposed to adopt it, for obvious reasons. I am satisfied that I have no power to compel the annuitant to adopt either the first or the second alternative. The first is out of the question, because the funds have been distributed. The redemption-price of £650 has been placed to a separate credit, and, so far as the estate is concerned, I cannot go back on what has been done. Then, as to the second alternative, I cannot compel the annuitant to purchase a Government or insurance-office annuity. The Act of Parliament transfers her claim to the purchase-money. I have the redemption-money set apart to meet her claim, and I think it would be contrary to the terms of the settlement under which she derives that the capital sum of £650 should be tied up until the time of her own or her husband's death, and that only the dividends on the investments representing that capital sum should be paid to her. The result would be that, instead of getting what she is entitled

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In re Dolling's Estate.

to under the settlement and the Act of Parliament, she would be receiving a much-reduced annuity, although, no doubt, she would have the capital to spend after her husband's death, or to dispose of by will in the event of her death in his lifetime. In result, I consider that the principle of *Nicholson's Estate* (1) is applicable to the state of facts existing in the present case, and I will make the order prayed for. If the figures before me are correct, I think that I am, in effect, securing for this lady a full annuity of £50.

As to the costs, I have felt some difficulty in ordering the costs of the unsuccessful motion to remove the restraint against anticipation to be paid out of the £650, for this obviously involves the removal of the restraint on anticipation to enable the applicant to pay her solicitor. And I do not assent to the proposition that trustees are entitled as of right to payment of costs out of the fund in such a case. However, as the application was made *bona fide*, and as the nature of the case and the special facts showed that the applicant was anxious to do what she, at all events, considered right, I think it is best for her that the restraint on anticipation should be removed to this limited extent, so that she may be relieved from liability to an action for costs. I accordingly allow eight guineas out of the redemption-price for the costs of the motion to have the restraint on anticipation removed.

Solicitor for the applicant: *J. A. French.*

J. E. W.

(1) I. R. 11 Eq. 177.

VAN BERKEL *v.* BOOTH.

(1905. No. 789.)

M. R.
1906.
Feb. 27.

Practice—Patent—Infringement—Application for inspection of machines relied on as anticipating plaintiff's patent—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 30.

In an action for infringement of a patent the Court has power, under section 30 of the Patents, &c., Act, 1883, to order inspection of a machine in the possession of the defendant relied on as evidence of publication of the alleged invention within the realm prior to the date of the plaintiff's patent.

The defendants in an action for infringement of a patent for an improved machine for slicing German sausages, by their particulars of objections alleged that the invention was published within the realm prior to the date of the plaintiff's patent, by the manufacture, sale, and use of certain machines by several persons named in the particulars. The plaintiffs applied to one of these persons for leave to inspect the machine so stated to have been made and used by him, and was informed that he had sold the machine to the defendants, and that it was in their possession. The plaintiffs then applied to the defendants for leave to inspect the machine, which was refused:—

Held, that the Court had power to order an inspection of the machine, and that it was a proper case in which to make such an order.

Garrard v. *Edge* (58 L. J. Ch. 397; 6 R. P. C. 372) discussed.

MOTION.

This was an application on behalf of the plaintiffs, that the defendants do produce for the inspection of the plaintiffs, or their agents, the cork-slicing or splitting machine referred to in paragraph 5 A (b) of the defendants' amended objections delivered in this action, at such time and place as might be agreed on by the parties, or, in default of agreement, to be fixed by the Court.

This action was brought for infringement of a patent for an improved machine for slicing German sausages and the like meat goods, granted to the plaintiff, Van Berkel, in the United Kingdom in 1898 (No. 5567). Van Berkel resided in Holland, and had granted to Parnall & Sons, Limited, of London (who were

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co-plaintiffs), an exclusive license under the patent for the use and sale of the invention in the United Kingdom.

A Dutch company was permitted by Van Berkel to manufacture and sell in Holland, but not in the United Kingdom, machines made according to the specification in the patent, except to Parnall & Co., and was also a co-plaintiff. The plaintiffs alleged that the defendants, Booth, Brothers, who carried on business in Dublin, had, amongst other things, infringed the patent by making or importing, and selling in Ireland, without the license of the plaintiffs, certain machines substantially the same as those described in the plaintiffs' specifications and claimed an injunction and damages.

The defendants, in the particulars of objections delivered with their amended defence, which traversed the plaintiffs' cause of action, relied, amongst other things, upon the fact that the alleged invention was published and anticipated in the United Kingdom prior to the date of the said letters patent by the manufacture, sale, and use of several machines, and amongst them "5 A (b) cork-slicing and splitting machines, from time to time manufactured by, and continually used by, Messrs. J. H. Bass & Co., at their works, 6, 7, 8, & 9, Featherstone-street, City-road, London, and later at 149A, High-street, Shoreditch, London, for upwards of thirty years prior to the date of the said letters patent."

Parnall & Co. applied to Bass & Co. for leave to inspect the machine referred to, but were informed by them that they had sold the machine to the defendants, who had it in their possession. Application was then made to the defendants for leave to inspect it, but this was refused: hence this application to the Court. An affidavit was made by the manager of Parnall & Co., and by their London solicitor, in support of the application.

G. Y. Dixon, for the plaintiffs:—

The Court has power to order inspection under section 30 of the Patents, &c., Act, 1883: *Garrard* v. *Edge* (1); *Germ Milling Co.* v. *Robinson* (2).

(1) 58 L. J. Ch. 397; 6 R. P. C. 372. (2) 1 R. P. C. 217.

Overend, for the defendants:—

Section 30 applies only to inspection of machines used by a defendant, and alleged by a plaintiff to be an infringement of his patent. Here the machine which the plaintiffs wish to inspect is not the machine which they say is an infringement of their patent. The machine is part of the defendants' evidence to sustain their defence of prior user. In *Germ Milling Co.* v. *Robinson* (1) the article sought to be inspected was the thing alleged to be an infringement. In *Garrard* v. *Edge* (2) Cotton, L.J., says (at page 374 of 6 R. P. C.):—"I don't know that there is any case where a man has been ordered to produce the exhibits, or whatever it may be, that his witnesses are going to give in evidence."

Dixon, in reply:—

Inspection was only refused in *Garrard* v. *Edge* (2) because the articles which were relied on as proof of prior user were not in the defendant's possession.

THE MASTER OF THE ROLLS:—

I think the plaintiffs are entitled to inspection of the machine referred to, though I do not know with certainty that it will be of much benefit to them, having regard to the other machines mentioned in the particulars of objections.

There is no affidavit showing that the machine referred to is not in the defendants' possession, or suggesting the slightest inconvenience, or any interference with their business, which would result from its inspection. I must treat this as a case in which the defendants have the machine and can produce it. It therefore does not come within the decision in *Garrard* v. *Edge* (2). The Court of Appeal there refused to grant the inspection on the sole ground that the articles were not in the possession of the defendants. The passage cited by Mr. Overend from the report of the judgment of Cotton, L.J., in the Reports of Patent Cases contains something more than that in the Law Journal. In the latter Cotton, L.J., says:—"It is, no doubt, desirable that the parties should come to the trial knowing what points they have to meet;

(1) 1 R. P. C. 217. (2) 58 L. J. Ch. 397; 6 R. P. C. 372.

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but I know of no order having been made for parties to produce what they have not got in their possession or custody." Lindley, L.J., there says:—"We are all familiar with applications for inspection of machines, models, and documents in the possession of an opponent; but the dies now sought to be inspected are not in the custody or possession of the defendants." That shows that section 30 of the Patent Act, 1883, is not restricted to an inspection of the actual machines alleged to be an infringement, but may apply to machines, models, &c, in the possession of an opponent. On that ground I think that there is power to order an inspection in this case. If so, is it a case in which an order ought to be made? I think that it is. It may assist the case of the plaintiffs, and that of the defendants, too—and the Judge also, if he obtains the assistance at the trial of experts who have examined the machine.

The Court made an order in the terms of the notice of motion.

Solicitors for the plaintiffs: *French & French.*
Solicitors for the defendants: *A. & L. Goodbody.*

W. L.

M. R. 1905. Dec. 12. *Appeal.* 1906. Feb. 14, 15, 27.

IN RE MAXWELL, DECEASED.
EIVERS *v.* CURRY.

Will—Construction—Residuary gift to executor.

The presumption that a legacy to an executor is *prima facie* given to him in that character for his trouble does not arise if the gift is of residue. *Griffiths* v. *Pruen* (11 Sim. 202) followed.

ORIGINATING SUMMONS.

James Maxwell, late of Forgney, in the county of Longford, died on the 4th day of November, 1901, unmarried, having on the 29th day of October, 1901, duly executed his last will, the material portions of which were as follows:—"I appoint the Rev. Patrick Curry, of Ballincurra, in the county of Westmeath, parish priest, and John Eivers, of Pallas, in the county of Longford, farmer, to be my executors. I hereby will and direct that my executors

aforesaid shall hold both of my farms—viz.: 'The Hill,' containing about 50 acres, and keep the Hill-farm set on the eleven months' system, and work the other holding until April, 1902, and then sell my twelve head of cattle, which by that time will have consumed the hay which I have at present, and after the sale of the said cattle, I wish my farm of 26 acres aforesaid to be also set on the eleven months' system. As soon as second-term rents can be fixed on my said farms, I wish same to be done, and the farms themselves sold by public auction. All moneys obtained by my executors out of the lettings of the said lands, and after paying my rents and taxes and other debts (if any), to be lodged by my executors in the National Bank, Ballymahon, or invested in National Bank shares at their discretion, until the said farms are sold; and when the purchase-money for said farms is received by my executors, it, together with any moneys to their credit, the produce of the aforesaid lettings, is to be paid over to the Rev. P. Curry aforesaid, and to be applied by him in having Masses said in Roman Catholic Churches in Ireland, open for public worship, for my own soul and the souls of my deceased parents, all Crown duties and necessary and proper disbursements being first made. I will and direct that when my twelve head of cattle aforesaid are sold next April, that the proceeds thereof, after all rents and taxes due on my 26-acre farm aforesaid are paid, are to go to the said John Eivers for his own personal use and benefit. I wish my shares in the National Bank (numbering twenty-four at present) to be applied in the first instance towards debts (other than rents), funeral and testamentary expenses, and expenses incidental to the administration of my estate, and the carrying out of the trusts of my will, and the balance (if any) to be applied by the Rev. Patrick Curry for Masses for my soul, and the souls of my deceased parents, in Roman Catholic Churches in Ireland, open for public worship. All the rest, residue, and remainder of my property, real and personal, I will and devise and bequeath to my executors aforesaid, for their own use."

The Rev. Patrick Curry renounced his right to probate of the said will, and probate of same was, on the 7th day of February, 1902, granted to the said John Eivers. The present summons was brought for the determination of the questions—(1) Whether,

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upon the true construction of the will, the bequest of the two farms of the deceased for the objects therein mentioned did not fail by reason of the death of the deceased within three months of the execution of the will? and (2), in the event of the said bequest failing and becoming residue, the name of the person or persons entitled to the same.

Matheson, K.C., and *William M'Grath*, for the plaintiff.

C. A. O'Conner, K.C., and *Denning*, for the defendant.

THE MASTER OF THE ROLLS:—

The questions raised by the summons in this case arose in the will of James Maxwell, dated October 29th, 1901. He died on November 4th, 1901. By his will he directed his farms to be sold, and the purchase-money, together with any money received for the letting of the farms, pending sale, to be paid to the Rev. P. Curry, to be applied by him in having masses said in public. He died within six days from the date of the will, and, therefore, the gift for masses, so far as it consisted of the proceeds of the farm, was, of course, void under section 16 of the Charitable Donations and Bequests Act, 1844, as the will was made within three months of the testator's death. But the principal question is as to the gift of the general residue, which is in the following terms:—"All the rest, residue, and remainder of my property, real and personal, I will, devise, and bequeath to my executors aforesaid, for their own use."

There is here no question, such as has often arisen, as to whether the executors take the residue beneficially or on trust. It is explicitly given "for their own use," and no point arises like that decided in *Parsons* v. *Saffery* (1). That was a case in the Equity Exchequer, decided in 1821 by Richards, C.B. He says, at p. 588—"Beyond all doubt the executors are by the terms of this instrument made trustees, and they have certainly each a pecuniary legacy given to them; but when the testator coupled with the pecuniary bequest those words—'together with all the rest and residue of my estate, whether real and personal,' it appears

(1) 9 Price, 578.

to me as clear a gift of the residue beyond those legacies as words can effect." And at p. 589, he says—"Now there is nothing in this will indicative of any such intention" (*i.e.* intention to exclude the executors from taking the residue); "on the contrary, as it appears to me the intention is express the other way. I am therefore of opinion that the executors are entitled to take the residue beneficially. The question there was different from what it would be now since the passing of 1 Wm. 4, c. 40, which altered the presumption of which that case is an illustration, viz. that the executors took the residue beneficially; and threw the *onus* on executors to show that they were intended to take the undisposed of residue beneficially. Here one of the executors, Father Curry, never acted, and renounced probate. The question is whether he thereby lost or forfeited his beneficial interest in the residue.

The general rule is stated in Hawkins on Wills, p. 309, thus:—"A legacy to a person appointed executor is *prima facie* conditional on his accepting the office." If, therefore, the gift here was specific, or simply pecuniary, no doubt could exist on the subject, the legacy would not take effect.

Another question not raised is whether the gift to the executors was as joint tenants, so that the survivor would take, and not as tenants in common, when there would be an intestacy as to the lapsed share. *Parsons* v. *Saffery* (1) shows that it was a gift to the executors jointly, and that it would go to the survivor, so that if the gift of the residue is conditional on the executor proving the will, Mr. Eivers would take the whole. But the case for Father Curry is rested altogether on the fact that the gift is residuary—a circumstance alleged to be sufficient to create an exception from the general rule—and there is authority for that contention. In *Griffiths* v. *Pruen* (2), Sir Lancelot Shadwell, V.-C., says, at p. 203—"I have always understood the rule to be that, when either a general or a specific legacy is given to an executor, he must prove the will in order to entitle himself to it; but that does not apply to the case of a residue." And in *Christian* v. *Devereux* (3) the same learned Judge followed his own decision in *Griffiths* v. *Pruen* (2).

(1) 9 Price, 578. (2) 11 Sim. 202. (3) 12 Sim. 264.

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The Vice-Chancellor there said, in the course of the argument, that, on a former occasion, he had considered the point, and that the conclusion which he had come to was that the rule as to a legacy given to an executor who did not prove the will, did not apply to a residue, and that there was no case which decided that an executor should be deprived of his right to a residue, or a share of residue, given to him, because he did not prove the will. These cases are referred to in the text-books as laying down and establishing an exception from the ordinary rule; and if it be an established exception, it must be followed where it applies. *Compton* v. *Bloxham* (1), before Knight-Bruce, V.-C., was relied on as confirming the view of Shadwell, V.-C. I do not think it does. It was not decided as a case of residue. Knight-Bruce, V.-C., says, at p. 203—"Upon the whole will I think that the bequests were made to Charles Bloxham not in his character of executor, and that he did not lose the benefit of them by not proving and not acting. It is not necessary, for the purpose of arriving at this conclusion, to decide whether the stock was given specifically or as part of the residue." Therefore, if there was this undoubted general rule, that case was decided on grounds that were unnecessary; it would have been enough to say that the executor took the residue whether he acted or not; and in reference to *Griffiths* v. *Pruen* (2) and *Christian* v. *Devereux* (3), Knight-Bruce, V.-C., says, during the argument, at p. 202—"In these cases, as in others, the Court struggled against the effect of a general rule, the propriety of which has been doubted." But whether the exception can be supported as sound or not, it must be regarded as at most a help in construing wills, and not as a universal and authoritative determination, binding even against the force of language and the context of the document. It will be remembered that the Vice-Chancellor in *Griffiths* v. *Pruen* (2) said that he had always understood the law to be as he stated it. Yet in *Barber* v. *Barber* (4) (decided by Lord Cottenham just two or three years before), a contrary decision had been pronounced by the Master of the Rolls (Lord Langdale); and though there was no appeal upon this point, it was certainly not

(1) 2 Coll. 201.
(2) 11 Sim. 202.
(3) 12 Sim. 264.
(4) 3 My. & Cr. 688.

dissented from by Lord Cottenham. On the will in that case it was impossible (just as here) to contend that the four persons named (being executors) did not take, if at all, beneficially. But one of them did not prove, and it was held that he took nothing. The question was, on the appeal, whether the other three took all, or whether there was an intestacy as to this one-fourth share? The testator there bequeathed one-fourth share of his residuary estate to his son John, and another one-fourth to his daughter Eliza, and directed that if both his son and daughter should die under twenty-one years of age (which happened), then the property bequeathed to them should devolve and become the property of Joseph Barber, John Stapp, Frederick Grigg, and George Capper, to be divided betwixt them in equal priorities, and to their heirs for ever; which last-mentioned four persons he also appointed as his executors, to see that everything was duly executed and performed according to his will and desire therein. He also appointed Thomas Garratt and John Garratt as executors in addition to the above persons, for which he requested these two friends to accept £50 each as a testimony of his regard. George Capper, Thomas Garratt, and John Garratt renounced probate of the will, which was proved by the three other persons named as executors, who alone acted in the execution of the trusts. The decree of the Master of the Rolls contained the following declaration (amongst other things) that the share which George Capper would, under the testator's will, have taken in the two several moieties of the one-fourth share of the residuary estate thereby bequeathed to Eliza Jane Mackintosh, and to her children, and also in the one-fourth share of such residuary estate thereby bequeathed to John Mackintosh, had, in consequence of Capper having renounced probate, devolved upon the defendants, Barber, Stapp, and Grigg, as tenants in common, and that those three persons were entitled in equal thirds to the said two one-fourth shares accordingly. That was the decree of the Master of the Rolls, and there was no appeal by Capper.

The plaintiffs, who were the personal representatives of John and Eliza Mackintosh, the sole next-of-kin of the testator, by their appeal, submitted that the contingent bequest over of the shares of residuary estate, previously bequeathed to the testator's son and

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daughter, was not a gift to the persons as a class, who should take upon themselves the office of executors, but was a gift to the four individuals named as tenants in common, that the one-fourth therefore of that residue, which Capper had lost in consequence of his declining to act, was a lapsed legacy, and went to the testator's next-of-kin. The Lord Chancellor says, at p. 695:—"The last question is one of much more difficulty" (viz. the question not whether Capper took a share though he renounced, but whether the share that he would have taken if he had acted went to the other three executors, or went as a lapsed legacy to the next-of-kin). "The plaintiffs claim the share of George Capper as undisposed of, the gift to him having failed by his refusing to act as executor. The three other executors named with him as residuary legatees, on the other hand, contend that they are entitled to the residue in thirds, including therefore the share destined for George Capper. The direction in the will is that, in the event of the death of John and Eliza Jane under twenty-one, the property bequeathed to them shall devolve to, and become the property of, the four persons, each particularly named and described, to be divided betwixt them in equal proportions, and to their heirs for ever, which last-mentioned four persons he appoints executors; and he afterwards appoints two other executors. It is not now in dispute that this bequest was made to these four persons as executors; that is, upon condition that they took upon themselves that office, and consequently that Mr. Capper, having renounced, cannot claim his share; but that being so does not appear to me to assist in the solution of the present question. That would have been so just as much if Capper had been the only executor, and the only legatee over. That question depends entirely upon whether the gift be conditional or not." Though the point did not arise for decision, it came very near it. At p. 701 the Lord Chancellor concludes thus:—"The Master of the Rolls considered this question as attended with very considerable difficulty, a circumstance which relieves me from much of the embarrassment I always feel when I have the misfortune to differ in opinion from him; but, after taking all the means in my power to come to a right conclusion, I should not be doing justice to the parties if I did not declare that I have come to a conclusion quite satis-

factory to my own mind, that the three survivors of the four executors named as residuary legatees of the part of the residue, cannot take the share destined by the will for Mr. Capper; but that he having given up his title to it, such share became undisposed of, and as such, belongs to the plaintiffs." That decision was in 1838, and *Griffiths* v. *Pruen* (1) was decided in 1841. What, then, becomes of the universality of the proposition of Shadwell, V.-C.? The truth is that while rules or propositions of construction ought not to be legally disturbed or frittered away, we have here a rule depending on the judgment of one Judge, and founded upon an error in fact (as to previous authority). It might be a question whether the Vice-Chancellor was not himself, by a nice distinction, frittering away a previous and well-established course of decisions, because, as Knight Bruce, V.-C., said, he did not like it.

In the present case, therefore, as in every other, I feel at liberty and bound to try first to ascertain what the intention of the testator was; if that cannot be made clear from the language he has used, then there is scope for presumptions. But if the meaning of the will is apparent, there can be no rule of law compelling me to violate the intention, if the latter be not in itself illegal and *contra bones mores*. For instance, if the testator had added to the residuary gift, "but this is not to take effect unless the persons described as executors choose to become executors by proving my will," or some similar expression, no rule could prevent effect from being given to such a wish.

Now what is the will? [His Lordship read the provisions of the will.] The will imposes a most onerous duty, or series of duties, upon the executors, far more so than that which the law attaches to the office itself. There is no remuneration given to Father Curry except in the residuary clauses. He could not make a profit out of the masses; at least the masses themselves, and not the particular priest who might celebrate them, were the testator's object. The gift is "to my executors, aforesaid." He does not even name them. But Father Curry never became, and is not, an executor at all. Supposing that both executors had renounced, could the testator who had entrusted them with such large and

(1) 11 Sim. 202.

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such onerous duties in respect of his property have meant that, the property lying derelict, they who had failed him absolutely and declined to become his executors should take the residuary estate beneficially as if they were his executors, which they never were? To ask this question is to answer it. The so-called executors are not mentioned by name in the gift of residue. They are not, and are not described as, testator's "friends" or "brothers," as in some of the cases, but executors merely.

On this will—and without quarrelling with the view of Sir Lancelot Shadwell, as a *prima facie* general rule, further than I have seemed to do—I think it my function to find out what this testator intended, from what he has said; and acting on that principle I cannot hold that *Griffiths* v. *Pruen* (1) applies. If the question had been put to James Maxwell, "What if Father Curry or John Eivers refuse to act? Are they then to receive the residue, leaving anyone who likes to administer the will?" I have no doubt he would have said, of course not; they would not then be executors at all. It is unfortunate for Father Curry that he did not see his way to undertake the trouble and responsibility which the executorship would have carried with it; but, refusing the service, he cannot complain if he thereby lose the reward.

W. L.

Appeal. 1906. Feb. 14, 15, 27.

The defendant appealed against so much of the decree of the Right Hon. the Master of the Rolls as declared him disentitled to a share of the residue.

Littledale, K.C., and *Denning*, for the appellant:—

We contend that the defendant did not, by renouncing probate, forfeit his share in the residue; no intention on the part of the testator can be found to annex the gift to the office. In *Griffiths* v. *Pruen* (1) Shadwell, V.-C., said:— I have always understood the rule to be that, where either a general or a specific legacy is given

(1) 11 Sim. 202.

(2) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

to an executor, he must prove the will in order to entitle himself to it; but that does not apply to the case of a residue." This rule was also applied by Shadwell, V.-C., in *Christian* v. *Devereux* (1); see also *Parsons* v. *Saffery* (2); *Compton* v. *Bloxham* (3). *Barber* v. *Barber* (4) is no exception to the rule; there was there an expressed intention on the part of the testator that any executor refusing to act should be deprived of his bequest. Every text-book on wills states the rule contended for, which has never been disputed: Roper on Legacies, 4th ed., vol. i., 780; Hawkins on Wills, 310; Theobald on Wills, 7th ed., 341; Jarman, 5th ed., vol. ii., 970; Williams on Executors, 9th ed., vol. ii., 1147.

Matheson, K.C., and *Muldoon*, for the respondent:—

No doubt, since 1840, the text-writers have laid down that the ordinary rule does not apply to a gift of residue; but the two decisions of Shadwell, V.-C., are the only authorities given for the proposition, and we submit that the distinction taken is ill-founded. *Barber* v. *Barber* (4) is opposed to the proposition of Shadwell, V.-C. In *Griffiths* v. *Pruen* (5), where this principle seems to have been first applied, Griffiths, the executor, died the day after the death of the testator, and therefore could not have proved the will. In the present case the defendant formally renounced probate; further, the gift there was "to my friend Thomas Griffiths," from which words can be deduced an intention to benefit the executor personally; here it is "to my executors," and if one of the latter renounces, it as if he had never been mentioned in the will. No reason for the supposed distinction between a specific gift and a gift of residue can be suggested. The will imposes certain onerous duties on the executors; and it is inequitable that an executor who refuses the burden of undertaking these duties should, nevertheless, take the benefit of the bequest to him.

(1) 12 Sim. 264, at 269.
(2) 9 Price, 578.
(3) 2 Coll. 201.
(4) 3 My. & Cr. 688.
(5) 11 Sim. 202.

Appeal. 1906.

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Feb. 27.

The judgment of the Court of Appeal was delivered by

HOLMES, L.J. :—

James Maxwell, whose property seems to have consisted of two farms, the stock thereon, and some shares in the National Bank, had no relative or friend whom he desired to benefit by his will. His wish was to convert his assets into money to be applied for what, in this country, is regarded as a charitable purpose—the celebration of Masses for the repose of his soul. Accordingly, he appointed John Eivers, a farmer, and the Rev. Patrick Curry, a priest, his executors, whom he probably selected in view of the character of his assets and the purpose to which they were to be applied. For specified reasons he postponed for a certain period the sale of the farms, and directed that in the meantime they should be let on the eleven months' system. He also appointed a time at which his cattle were to be sold; and he bequeathed the proceeds to Eivers, probably as a recompense for the trouble he would be put to in connexion with the land. I infer that he was given this legacy because he was named executor; and there would be no reason for not applying to it the rule that he would forfeit it if he did not prove the will. The farms and shares when converted into money, after payment of debts and funeral and testamentary expenses, were to be handed over to the other executor to be applied for the celebration of Masses. This was, as I have said, a charitable trust, and did not, in my opinion, depend upon Father Curry accepting the office of executor. The fact that the testator intended this to be the ultimate destination of his money may have led him to name a priest as one of his executors; but the property was not thus disposed of because one of the executors was a priest.

Therefore, I am of opinion, that whether Father Curry proved the will or not, he was entitled to receive the fund and was bound to apply it for the celebration of Masses. He may have shared himself in the honorarium thus provided for the performance of the religious service, but this is immaterial. I understand, from the evidence in a case recently before this Court, that moneys thus given are distributed according to certain rules which probably vary in different dioceses; but with this we have nothing to do.

Having thus disposed of his farms, his cattle, and his bank

shares, he concludes his will by a residuary gift to his executors aforesaid for their own use. If the previous bequests had been valid at the time of the testator's death, the residue would probably have been small; but as he died within three months of the execution of the will, the gift of the two farms failed, and they thus became part of the residue. Hence the contest which has now arisen between John Eivers, who proved the will, and Father Curry, who renounced, the former asserting that he is entitled to all the residuary estate, and the latter claiming a moiety of it.

A testator giving a legacy to an executor may, and often does, show by his testamentary language that the gift is conditional on his accepting the office, and is a recompense for his services therein. On the other hand, he may make it appear that it is a gift unconnected with the office. In such cases the intention of the testator is carried out. But it frequently occurs that in the will there is no evidence of intention—that there is nothing more than a bequest to an executor. Now I think that the gift of the residue by James Maxwell is of this character; and we must look for guidance to a rule of law, if we can find one. I believe there is such a rule. It is well settled that where there is a pecuniary or specific bequest to an executor, and there is nothing from which it can be inferred that the legatee would in any case have been an object of the testator's bounty, it must be held that the gift is conditional on his proving the will. It would be difficult to suggest any logical basis for this rule. No doubt a modest legacy is often given to the person named as executor to induce him to act; but it happens still more frequently that a testator selects his executor from those amongst whom he had determined to divide his property. It is, however, no objection to a rule of law, that it is more or less arbitrary, provided it is definitely established; and if the present case were within it, I should act on it without hesitation.

The rule undoubtedly applies to pecuniary and specific legacies, but in every text-book published within the last sixty years it is stated that it does not apply to residuary bequests. The authority for this proposition is a case decided by Sir L. Shadwell, in the year 1841. He lays this down without doubt or hesitation as a principle of law with which he was familiar; and he again acted

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on it in the following year, nor has it since been questioned or doubted. It is true that the point has not been re-agitated; but that can be accounted for by the fact that it has been accepted in the numerous cases in which an executor is also residuary legatee. It is, I think, easier to suggest a reason for the exception than for the rule. If a testator desires to give some remuneration to an executor for the trouble and responsibility entailed on him by his acceptance of the office, the natural mode of doing so would be by a money or other specific gift, bearing some proportion to the services in return for which it is given. But the residue is what remains of the assets after the discharge of debts and claims on his bounty recognized by the testator. Its value cannot be measured with anything like certainty. It is often diminished or, as in the present case, increased by causes that cannot be anticipated, and would therefore be ill-fitted as a recompense for the performance of definite duties. Moreover, the conception in both law and fact of a residuary bequest is that when it is reached, the assets have been fully administered, and that the duties of the executors have come to an end.

Sir L. Shadwell was called to the Bar in 1803. He is stated in the Dictionary of National Biography to have been an accomplished lawyer, to have had large business, and to have been the first Chancery leader who confined his practice to a single court. He became Vice-Chancellor of England in 1827, and for twenty-three years was a distinguished Judge. I assume that when he stated that the rule as to an executor forfeiting a legacy if he did not act did not apply to a residue, he was giving accurately the result of an experience of thirty-seven years; nor can I find anything to cast doubt upon his proposition.

Barber v. *Barber* (1), decided in 1838, certainly does not do so, for in that case Lord Cottenham stated emphatically that the basis of his judgment was the language of the will, which gave some indication of an intention that the bequest was conditional, while he was confirmed in his view by the unequivocal terms of a codicil, which, though unattested, was sufficient, as the law then stood, to dispose of personal property. I am not prepared to

(1) 3 My. & Cr. 688.

hold that Shadwell, V.-C., misunderstood a rule of law with which he must have been familiar; and, therefore, I am of opinion that the appeal ought to be allowed.

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Solicitor for the plaintiff: *C. J. P. Farrell.*
Solicitor for the defendant: *A. T. Ellis.*

R. ST. J. C.

SWITZER & CO. (LTD.) *v.* ROCHFORD.

M. R. 1905. Dec. 15.

Perpetuity—Rule against—Creation of annuity charged on leaseholds—Rent-charge—Chattel interest—Term of 500 years—Proviso for redemption at fixed price—Remoteness.

J. granted an annuity or rentcharge of £30 (Irish) a year, for a term of 500 years to trustees upon certain trusts, and charged same on leasehold premises, with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the 500 years, to purchase or redeem the annuity for £300 (Irish), which was then to determine and be void:—

Held, that the proviso for redemption of the annuity did not infringe the rule against perpetuities, and was not void for remoteness.

ORIGINATING SUMMONS.

By a post-nuptial settlement, made in pursuance of marriage articles, and dated 9th July, 1825, one John Cooke granted a yearly rentcharge or annuity of £30 (Irish) a year, for a term of 500 years, to trustees, to be held by them upon certain trusts, and the said John Cooke charged his leasehold interest in premises in Wicklow-street, Dublin, with the said rentcharge; and by the settlement it was provided and declared that it should be lawful for the said John Cooke, his executors, administrators, and assigns, from time to time, and at all times thereafter during the said term of 500 years, to buy and purchase from the said trustees and the survivor of them, his executors, administrators, or assigns, the said annuity of £30 a year, at and for the sum of £300 (Irish), and that upon payment thereof the said annuity should cease, determine, and be void.

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It appeared that John Cooke's interest in the said leasehold premises had become vested in the plaintiffs (Switzer & Company, Limited), and that one moiety of the annuity of £30 had become vested in the defendant, Mrs. Rochford, the other moiety having been redeemed by the plaintiffs. The defendant had refused to permit herself to be redeemed on the terms provided by the settlement of 1825, and a summons was accordingly taken out for the determination of the question whether, under the settlement, the plaintiffs were entitled, as against the defendant, Mrs. Rochford, to purchase or redeem one equal moiety of the annuity of £30 (Irish) upon payment of the sum of £150 (Irish).

Herbert Wilson, K.C. (with him *Leet*), for the plaintiffs:—

The question to be determined is whether the proviso in the settlement of 1825 is void for remoteness.

We submit the proviso is a valid one. The rule against perpetuities is subject to certain well-known exceptions: see Challis's Law of Real Property, pp. 174–177. Amongst others, it has never been questioned that conditions in defeasance of a term of years, that covenants in leases for perpetual renewal, and that negative covenants (in conveyances of the fee) on the principle of *Tulk* v. *Moxhay* (1) are outside the rule. A fourth possible exception is that of Common Law conditions in defeasance of the fee on the ground that the rule against perpetuities never applied to conditions at Common Law. There are also other exceptions such as Welsh mortgages of various kinds. *London and South-Western Railway Co.* v. *Gomm* (2) is clearly distinguishable from the present case, and the distinction is this:—In that case there was a covenant giving an option of re-purchase, here there is a condition; there the jurisdiction was the equitable one of specific performance, here there is the bare legal question as to the estate created by this Common Law settlement.

The present proviso or condition is sustainable on three grounds. Either as a condition in defeasance of a term, which it certainly was; or as a proviso for redemption similar to that in a Welsh mortgage: *Howel* v. *Price* (3); or, thirdly, as a Common

(1) 2 Ph. 774. (2) 20 Ch. D. 562. (3) 1 P. W. 290.

Law condition. The last alternative is strongly supported by the judgment of Palles, C.B., in *Attorney-General* v. *Cummins* (November 28th, 1895, *infra*, p. 406); but that view, possibly, does not prevail in England: *Trustees of Hollis' Hospital and Hague's Contract* (1); *In re Ashforth*; *Sibley* v. *Ashforth* (2).

Molony, K.C., for the defendant, Mrs. Rochford:—

The proviso for the cesser of this annuity of £30 is an executory interest limited to take effect at any time within 500 years, and is therefore void, as transgressing the rule against perpetuities. It is not a condition in defeasance of a term, nor a Welsh mortgage, as there was no debt.

London and South-Western Railway Co. v. *Gomm* (3) really decides this case in our favour.

In *The Attorney-General* v. *Cummins* (4) there was a grant until redemption, and this present proviso for re-purchase is clearly distinguishable. But in any event the English decisions are opposed to the views of Palles, C.B. Here there is simply a grant of an annuity for a period of 500 years with an option to purchase, and in such a case the rule against perpetuities applies, and the option is void for remoteness: *Woodall* v. *Clifton* (5).

THE MASTER OF THE ROLLS:—

This matter comes before me on summons, on an application on the part of the plaintiffs, as assignees of one John Cooke of certain leasehold premises, subject to an annuity or yearly rentcharge of £30 (Irish), under an indenture of settlement of 9th July, 1825, subject to a proviso for redemption or cesser of said annuity on payment of £300 (Irish); and the questions for determination, as set out in the summons, are—(1) "Whether, under and by virtue of the said indenture of settlement, the plaintiffs, Switzer & Company, Limited, are entitled as against the defendant, Elizabeth R. Rochford, to purchase or redeem one equal moiety of the said annuity of £30 (Irish), so charged, as aforesaid, upon the said premises, upon payment to her of the sum of £150 (Irish) in

(1) [1899] 2 Ch. 540.
(2) [1905] 1 Ch. 535.
(3) 20 Ch. D. 562.
(4) *Infra*, p. 406.
(5) [1905] 2 Ch. 257.

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accordance with the terms of the said proviso in the said indenture of settlement contained? (2) How the costs are to be borne?"

No question has been raised before me as regards the partition of the annuity, or the division of it into two portions; and the matter has been submitted and argued simply as a question of the legal right to redeem the annuity, and in that light I proceed to consider it.

The way the matter stands is this—The original post-nuptial settlement is dated 9th July, 1825, and by it, after very complicated arrangements in reference to other property not the subject of the present application, it was stated that a marriage had been solemnized between C. Kerns and Mary Anne Kerns, in November last, and reciting an ante-nuptial agreement that John Cooke "should charge certain premises in Exchequer-street and Clarendon-street, in the city of Dublin, belonging to him, the said John Cooke" (those are the premises in question) "with an annuity of £30 a year for the term of 500 years, as hereinafter mentioned, and by good and sufficient deeds convey said annuity to two trustees in trust to pay the same as hereinafter mentioned, provided, however, that said John Cooke, his executors, administrators, and assigns, should have a power of redeeming said annuity of £30 a year on payment of a sum of £300," which was to be invested as afterwards directed. It is to be observed that the power of redeeming the annuity on payment of £300 was a power to redeem it at ten years' purchase; and of course the redemption of a well-secured annuity at 10 per cent. on the capital sum fixed on as the redemption-price is rather a tempting investment. But the question is whether the power of redeeming the annuity, as its redemption might take place at any time during the term of 500 years, is void as contravening the rule against perpetuities. The operative part of the deed, so far as the present question is concerned, is as follows:—"And this indenture further witnesseth that in further pursuance of said recited agreement, and in consideration of the sum of 10*s.* sterling (paid by the trustees of the marriage settlement) the receipt of which he, the said J. Cooke, doth hereby acknowledge . . . He, the said J. Cooke, doth give, grant, bargain, sell, assign, and make over unto the said

H. M'Farland and E. Foley" (the trustees) "and the survivor of them, and the executors, administrators, and assigns, of such survivor, one annuity or yearly rentcharge of £30 sterling a year charged and chargeable upon, and to be issuable and payable out of, all that and those said dwellinghouse and premises situate, lying, and being in Exchequer-street and Clarendon-street, in the city of Dublin, to have and to hold said annuity or yearly rentcharge of £30 a year to the said H. M'Farland and E. Foley and the survivor of them, and the executors, administrators, and assigns, of such survivor, from the day of the death of the said J. Cooke, for, and during, the full term of 500 years from thenceforth next ensuing to be fully completed and ended, said annuity or yearly rentcharge to be payable half-yearly."

It will be observed, therefore, that there is a conveyance or grant of a rentcharge, secured by power of re-entry and distress, not worked out by the appointment of trustees, nor through the Statute of Uses, nor by a trust, but given directly by the instrument creating it, as at Common Law, to the trustees of the settlement. There is no use under the Statute: it is a chattel interest, and the annuity in this case is simply a chattel term in a rentcharge, charged on an estate for 500 years, and limited to the executors, administrators, and assigns. Then there is the power of entry and distress. The proviso on which the question turns is this:—"Provided always, however, and it is the true intent and meaning of these presents, and of the parties hereto, that it shall and may be lawful to and for the said J. Cooke, his executors, administrators, and assigns, from time to time, and at all times hereafter, during the said term of 500 years, to buy and purchase from said H. M'Farland and E. Foley and the survivor of them and the executors, administrators, and assigns, of such survivor, said annuity of £30 a year, at and for the price or sum of £300, and that upon payment of said sum of £300," and discharging all arrears, and so forth, "then, and from thenceforth, the said annuity or yearly rentcharge of £30 a year shall cease, determine, and be void." It then goes on to deal with the trusts of the £300 purchase-money, one of the trusts being for investment on landed security or in Government securities. No question arises as regards the investment; but the question before me is simply as to the annuity.

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It is merely a term of years at Common Law for 500 years, with a proviso that the annuity may be redeemed at any time during the term.

Mr. Wilson, for the plaintiffs in support of his contention, relied on the judgment of Palles, C.B., in the information of *The Attorney-General* v. *Cummins* (1), which information and judgment are both interesting reading; but the decision has not any exact bearing on the present case, because it turned on the question of the validity of a Common Law condition determining and making void a grant in fee-simple of quit rents—at a period beyond that allowed by the rule against perpetuities (where that rule applies); and it was decided that the rule against perpetuities did not apply because at Common Law the rule did not exist as being contrary to the spirit of the Common Law, and so it was held that the Crown were entitled to purchase up certain quit rents on payment of £5000. It may have no direct or conclusive authority in the present case, as it was decided on the ground that it was a Common Law condition in defeasance of an estate of freehold. As against that view of the law, as presented by Mr. Wilson, some cases have been cited; and *London and South-Western Railway Company* v. *Gomm* (2) was mainly relied on.

There, by deed made between the plaintiffs of the one part, and one Powell of the other part, after reciting that the plaintiffs were seized of the fee-simple of certain land, and that they had contracted to sell to Powell at the price of £100, and subject to conditions thereinafter contained, they conveyed the land in fee to Powell, and the grantee covenanted that he, his heirs or assigns, would, when the land was required for railway purposes, reconvey to the Company at any time thereafter on receipt of £100. The defendant was an assignee of Powell. The question was, when the Railway Company came to exercise their power to re-purchase the land, whether it was void as transgressing the rule against perpetuities; and it was held, that it was void on that ground as being an executory interest in land given to the Company, that is, the right to re-purchase the fee, which prevented the land from being dealt with, for a period that the law would not allow.

That case has thus slight bearing on the present, where nothing

(1) *Infra*, p. 406. (2) 20 Ch. D. 562.

has been done imposing any clog whatever on dealing with the land. It is not disputed that the term of 500 years is a perfectly good and valid term. It is so admitted by both sides; and the proviso for cesser is one which shortens the term in a specified event. So far from restraining the power of dealing with the land, it facilitates that dealing in the specified event; and the very basis and reason of the rule is that perpetuities prevent dealings with land.

Woodall v. *Clifton* (1) has even less bearing on the present question. The facts were these. A lease of land was granted for ninety-nine years in 1867 by a lease which contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee-simple of the land at the rate of £500 per acre, the lessor, his heirs, or assigns, on receipt of the purchase-money, should execute a conveyance of the land in favour of the lessee, his heirs and assigns. In 1904 an action was brought by an assignee of the lease, who had given notice of his desire to exercise the option, against the assignees of the lessor to compel a conveyance of the land. It was held that the liability to perform the proviso or covenant did not run with the land, and that the action could not be maintained. The question of perpetuity was raised in that case, but was not decided. There is a *semble* in the marginal note "that the option was void on the grounds of remoteness"; but even if it had been so held, the decision goes no further than *Gomm's Case* (2), and amounts to this, that a power to purchase land at a definite sum at any time after the contract was void as preventing dealing with the land, and thus transgressing the rule against perpetuities.

None of the other cases referred to have any application to the present, where the question is whether a good legal rentcharge which is a legal chattel interest may be put an end to at any time by payment of a fixed sum of money. If that proviso is void or invalid, then similar provisoes in marriage settlements in defeasance of a term of years might be equally invalid. This term just ceases on the payment of the redemption-price of the annuity. It is as if the demise were for 500 years, or so long as the £300 should not be paid within that time. There is nothing in that to offend the

(1) [1905] 2 Ch. 257. (2) 20 Ch. D. 562.

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rule against perpetuities any more than exists in the case of a mortgage of a term; and, therefore, the plaintiffs are entitled to the decision they ask for.

Solicitors for the plaintiffs: *Wm. Fry & Son.*
Solicitor for the defendant: *Garland.*

R. W. L.

THE ATTORNEY-GENERAL *v.* CUMMINS AND OTHERS.

(Before PALLES, C.B., and ANDREWS and MURPHY, JJ.—28 Nov. 1895.)

PALLES, C.B.:—

The first question for decision is the legal effect of the Letters Patent of 5th July, 31 Charles II. By those Letters Patent King Charles II. granted to Thomas Lord Audley, Earl of Castlehaven, his heirs and assigns, certain quit rents particularly mentioned in the Patent and therein stated to amount in the whole to the yearly rent or sum of £499 19*s.* 11¼*d.*, "to hold the same to the earl, his heirs and assigns, "till he or they should receive and be paid the sum of £5,000 sterling at one entire payment, and without any manner of account, or any other thing to be rendered or paid unto His Majesty, his heirs and successors, of or for the same or any part thereof."

By the present information, filed upwards of 200 years after this grant, the Attorney-General asks that Her Majesty shall be at liberty to redeem the quit rents by paying the sum of £5,000; that she may be at liberty to pay that sum into Court; that if necessary a release of the quit rents may be decreed to be executed by all necessary parties; that new trustees of certain instruments may be appointed (such trustees being, as I presume, in the view of the Crown necessary parties to the release); and that the quit rents may be ordered to be put in charge in the Crown rental for collection in future by the proper officer on behalf of Her Majesty.

There has been some argument as to the nature of the estate granted by the Letters Patent. In my opinion, that estate was that which is sometimes called a base or qualified fee (1), and sometimes a fee determinable (2). The grant passed the quit rents

(1) Co. Litt. 1 b; 2 Bl. Com. 109. (2) Plowd. 557.

in fee subject to a condition determining that fee upon the payment by the Crown at any time of the sum of £5,000. Under such a grant the grantee, until the happening of the determining event, has the whole estate in him, and the old Common Law doctrine was undoubtedly that a possibility of reverter, a possibility coupled with an interest, remained in the grantor, and that the fee of the rents would, upon the performance of the condition, revert to the Crown. "If," says Plowden (p. 557), "land is given to a man and to his heirs so long as he shall pay 20*s.* annually to A, or as long as the Church of St. Paul shall stand, his estate is a fee-simple determinable, in which case he has the whole estate in him, and such perpetuity of an estate which may continue for ever, though, at the same time, there is a contingency *which when it happens will determine the estate.*" The case for the Crown is, that this Common Law doctrine still prevails notwithstanding the modern rule against perpetuities. The defendants, on the other hand, insist that the rule as to perpetuities applies, and defeats the estate in the Crown. Whether it does or not, is the principal question.

It is, however, further contended by the defendants that, as in the case of the Attorney-General, the Crown would on payment of the money have the legal estate, the release sought, or any intervention of this Court as a Court of Equity, would be unnecessary, and that therefore the information should be dismissed. I agree that the Patent is not in the nature of a mortgage; and that as a suit for the redemption of a mortgage, this information cannot be maintained. Nevertheless, as the acts of those claiming through the Patentee have so complicated the title to the quit rents as to render it difficult, if not impossible, for the Crown to ascertain without the aid of this Court the parties entitled to receive the money in question, which, at law, they are entitled to pay, and for which they are entitled to obtain a legal discharge, I cannot entertain any doubt that the Attorney-General is entitled to come into this Court by an information against all the parties having estates in the rents, and have discovery as to the parties entitled to the money, on payment of which the fee will vest in the Crown, to have the rights of those parties determined *inter se*, as in an interpleader suit, and to have the money in question brought in to the credit of the suit, and, pending the ascertainment of the parties

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entitled to it, to have the sum so lodged treated as having been actually paid to such of the parties in the suit as the Court may ultimately decide to be entitled to it. This relief I conceive the Crown to be entitled to, even upon an information framed as is the present.

Thus, the only real question is whether the estate of the Crown is defeated by the rule against perpetuities.

The grant in question operated at Common Law. It did not take effect under the Statute of Uses, and the modern rule against perpetuities never applied to Common Law conveyances. It is impossible that it could have applied, as it had its origin in the Statute of Uses, as is matter of elementary knowledge; and the subject-matter of that statute did not include conveyances other than those to uses.

There was no doubt a doctrine which was sometimes quaintly and unintelligibly (and indeed, as shown by Lord Northington, erroneously) enunciated as the rule that an estate could not be limited to take effect upon a possibility upon a possibility. This rule related to the ascertainment of the person who was to take, and is shown by Mr. Preston to be confined to cases in which either such person was insufficiently designated, or in which there was no individual who answered the description, if sufficient. This doctrine has no application to the present case.

The only mode by which the Common Law held that a previous estate might be determined before its natural expiration was by means of the annexation of a condition. But if a condition were annexed, then, on the happening of the stipulated event, the estate was defeated, and the donor or his heirs were entitled to enter, and on entry, or in a case like the present, where the subject-matter is incorporeal hereditaments without entry, was in of his former estate. If modern recognition of this Common Law elementary doctrine be required, it will be found, in the opinion of Lord Cairns (then Lord Chancellor), in *The Buckhurst Peerage Case* (1):—"The Common Law did understand one mode of putting an end to an estate which in the first instance appeared to be granted absolutely, that is to say, it understood the mode of terminating an estate by means of the annexation of a condition. If

(1) 2 App. Cas. 1, at p. 26.

a condition was annexed to an estate which otherwise would have been absolute, then on the happening of the condition the estate was defeated. But then, my lords, it was not defeated for the benefit of the remainderman; nor could a remainder have been annexed to the condition. It was defeated as defeasible by or *for the donor* who was entitled to enter for condition broken."

A feoffor making a feoffment in fee, containing such a condition, retained thereafter an interest in the lands which was called a possibility. That possibility was coupled with an interest, and upon the performance of the condition, this interest, by the determination of the estate of the feoffee, expanded into an estate in fee, and the feoffor was in as of his former estate. It was not that the feoffment was construed as containing a limitation of the estate to the feoffor upon the performance of the condition, but that the "possibility," which always continued in the feoffor, became in event an estate in fee.

I fear that I have too much laboured these elementary propositions; but it is essential to do so to expose the fallacy which underlies the contention of the defendants.

Now, there is not a trace in the books of any rule which limited the period during which the determination of an estate by condition should take effect, and it is abundantly clear that the modern rule could not have applied, because the donor took not by way of new limitation, but by the determination of the estate given.

An estate to A and his heirs, so long as they were tenants of the manor of Dale, is a form of limitation frequently found in the old books. It was held to vest in A an estate in fee, determinable upon him or his heirs ceasing to be tenants of the manor. There is no instance (as remarked in the *Buckhurst Peerage Case* (1)) of such an estate being followed by a remainder to other persons. It was not possible that it could be, because the *whole* fee was vested in the grantee of the determinable fee until the performance of the condition, and a fee could not at Common Law be limited upon a fee; but no doubt was ever entertained that, on the happening of the indicated event and entry by the donor, the

(1) 2 App. Cas. 1.

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estate granted determined. In whom, then, did the fee vest? It was not in the donee, *ex hypothesi* his estate had ceased. It could not have become vested in a stranger, as at Common Law such a limitation would be void. But, necessarily, it should be in someone. The only person in whom it could be—and, therefore, the person in whom it must have been—was the donor, or those claiming through him. Irrespective, therefore, of its non-application to estates, created by Common Law conveyances, the rule against perpetuities could not, from the nature of the estate, apply in a case like the present, without abrogating the elementary principle that, on the happening of the event, the fee in the grantee determined.

These considerations, in my opinion, conclude the case. As, however, it has been so elaborately argued, it may be right that, in deference to the defendants' counsel, I should express my view more fully as to the origin of the rule.

Uses, before the Statute, were not within the cognizance of the Common Law; effect was given to them by Courts of Equity holding that they affected the conscience of the feoffee, and it was of course competent to these Courts to refuse to give effect as against the legal estate to uses which they considered to be injurious to the State. The history of England demonstrates that long prior to this period there was the utmost jealousy against anything that at Common Law would render land inalienable for a lengthened period, such, for instance, as the vesting of it in a corporation. The Lord Chancellors, to whom the origin of this rule is to be traced, did not affect to alter the Common Law, nor was it within their competence to do so; but when, before the statute, the practice became common of conveying to a feoffee or trustee to uses, and where the estate of the *cestui que use* was cognizable in Equity only, they refused the relief of that Court in favour of the *cestui que use* as against the Common Law estate in cases in which, had relief been afforded, the land would have been rendered inalienable for a period which they considered unreasonable. Thus, but for the Statute of Uses, the rule against perpetuity would, until the present, have had no relation to estates created by deed; and, as to other estates, would have remained a purely equitable doctrine. But then came the

statute which clothed with the legal estate any use which had been validly created. At this point the Common Law Courts had to intervene, as it was their province to determine where the legal estate was. But to do so they should first determine that the use was a valid one, and in determining this question, which, up to this time, had been purely an equitable one, they adopted the principles which Courts of Equity had theretofore acted upon. Thus the rule as to perpetuities became a Common Law doctrine applicable to springing and shifting uses, and executory and other limitations of property, which could not be created by a Common Law conveyance, and which could take effect only under the Statute of Uses. If I am right in this, the doctrine must be inapplicable to estates created by Common Law conveyances, and especially to estates which reverted to donors on the performance of conditions which determined estates.

In support of what I have said, I shall refer but to two authorities—(1) The Report of the Commissioners appointed to inquire into the law of England respecting real property, including amongst their number such eminent Conveyancers as Mr. Duval, Mr. Hodgson, and Mr. Brodie, who are the very highest authorities upon questions of this nature. In their third report they state as follows:—"The instances adduced in illustration of the law of perpetuity are all interests springing out of the Statutes of Uses and Wills or deriving effect as executory trusts, and there are interests which, as they have remained interests at the Common Law, and are uninfluenced by the Statute of Uses, or by the doctrine of trusts or devises, have never been considered to be subject to the rules against perpetuity."

So, too, Lord St. Leonards, in his introduction to his edition of Gilbert on Uses (p. xl), says—"*Remainders* at that time," *i.e.* before the Statute of Uses, "*might have been limited to take effect at any period*, however remote. Questions of perpetuity did not arise till the simplicity of the Common Law gave way to the complication of modern conveyancing"; and in his work on Powers (p. 1), the same learned personage says:—"Simplicity was the striking feature of the Common Law, in regard as well to the estates which might be created, as to the modes by which they might be raised. Estates could only be limited in possession, or by way of remainder, that

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is, on the natural expiration of the preceding estate. A *condition* might, however, have been annexed, as it still may be, to an estate on its original creation; but this did not answer for the purpose of a settlement, because, for a breach of the condition, only the grantor or his heir could enter, and his entry would defeat all the remainders dependent on the estate to which the condition was annexed. *Questions of perpetuity did not arise* until the simplicity of the Common Law gave way to the complication of modern conveyancing."

It is interesting to point out that, even in these modern times, we have cases which depend for their solution upon the validity of Common Law conditions such as the present. I refer to cases of Welsh mortgages, instances of which have occurred even during my own practice at the bar. They are well illustrated by *Howel* v. *Price* (1). There one Davis mortgaged lands, in Wales, by lease and release, to one Reynolds, and his heirs, for securing £300, with a proviso that if Davis, his heirs or assigns, should, at Michaelmas, 1702, *or at any Michaelmas following*, pay to Reynolds, his heirs or assigns, the sum of £300, and all arrears of rent or interest which should be then due, the conveyance should be void. It was decreed that this was in the nature of a conditional purchase, subject to be defeated on payment by the mortgagor or his heirs of the sum stipulated on Michaelmas Day at the election of the mortgagor or his heirs, and that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages, and, therefore, there could be no equity of redemption nor any occasion for the assistance of a Court of Equity, but that the plaintiff might even at law defeat the conveyance by performing the terms and conditions of it, which were not limited to any particular time, but might be performed on *any* Michaelmas Day *to the end of the world.*

For the defendants we have been referred to two cases which ought not to be passed over without notice, viz.: *London and South-Western Railway Company* v. *Gomm* (2), and *Cooper* v. *Stewart* (3).

(1) 1 P. W. 291; 2 Vern. 701; Pre. Ch. 423, 477.
(2) 20 Ch. D. 562. (3) 14 App. Cas. 286.

In the first of these cases the question arose upon a conveyance in fee by the Railway Company which contained a covenant by the grantee that he would, at any time thereafter, whenever the land might be required for the railway or works, and when requested by the Company on a six months' notice, and upon receiving £100, reconvey the lands to the Company. The distinction between that case and the present is that there there was a covenant, here there is a condition; there the jurisdiction was the equitable one of specific performance, here there is the dry legal question as to the estate created by the Common Law conveyance.

In *Cooper* v. *Stewart* (1) the question was the validity of a reservation in a Crown grant of lands in New South Wales of "such parts of the said lands as are now or shall hereafter be required by the proper officer of His Majesty's Government for a highway or highways, and further any quantity of water and any quantity of land not exceeding ten acres *in any part of* the said grant *as may be required for public purposes*, provided always that such water or lands so required should not interfere with or in any manner injure or prevent the due working of the water mills erected, *or to be erected*, on the lands, and water-courses hereby granted." There the counsel for the Crown (now Lord Davey) insisted that, although the rule against perpetuities had been applied to conveyances operating under the Statute of Uses, it had not been applied to Common Law conditions or conditional limitations in Common Law grants which would have been valid before that Statute. Lord Watson, having referred to these arguments, says—"It does not appear to their Lordships to be necessary for the purpose of the present case to decide whether the Crown, in attaching such reservations to grants of land in England, would be affected by the rule against perpetuities." He then proceeds to decide in favour of the Crown upon the ground that the rule did not, in that colony, apply against the Crown. The case cannot be said to be an authority one way or the other. It does not even show that the question is arguable, as it would have been illogical for the Privy Council to have given an opinion upon

(1) 14 App. Cas. 286.

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a rule which they held to be inapplicable to the case before them.

The only remaining matter which was argued can be disposed of in a few words. It appears that for many years the Patentee has not been in receipt of some of the quit rents which are expressed to be granted, but it does not very clearly appear whether these latter quit rents were vested in the Crown at the date of the Patent. In my view the latter circumstance is immaterial. I am willing to assume that the Crown had not title to this portion of the quit rents. The Attorney-General is content that the declaration of the title of the Crown should be confined to the residue.

But the defendants say that we should compel the Crown, as a condition precedent to our declaring it entitled to this residue of the quit rents, to pay into Court, in addition to the £5000, the portions of these quit rents which accrued due during the last 200 years, and which the defendants allege still remain unpaid. Many answers may be given to this contention; I shall mention but two. Our decree in this suit will do no more than give effect to a legal estate vested in the Crown. Upon lodgment in Court of the £5,000, the rents will, as between the Crown and the defendants, revert to the Crown, and we can no more refuse to direct that those rents shall be put in charge on the Crown rental for collection in future by the proper officer on behalf of Her Majesty than upon an information of intrusion we could refuse the authority of this Court to remove the intruder from the lands of the Crown. It cannot be contended that the defendants have any equitable right to restrain the Crown from insisting upon its legal title. But further (and this goes to the whole merits of this portion of the defence) the grant of Charles II. was not one for valuable consideration. It was an act of mere bounty, and it does not contain any warranty of title. Its effect, even had it been the grant of a common person, would have been no more than to pass such estate in the rents as the grantor had, and the grantee would have been without remedy if the title of the grantor turned out to be defective. For this reason it is unnecessary to consider how the case would have stood had the grant been such as had it been that of a common person might have been the foundation of an action against him for damages. Even in that event, I cannot see what

jurisdiction we should have had without a petition of right; and even were there such a proceeding, the case would, for other reasons, be full of difficulty.

Upon the whole, then, I am of opinion that both of the defences relied upon by the defendants fail, and that there must be a decree declaring that, upon the true construction of the Patent, the estate thereby granted in the quit rents will, upon payment of the sum of £5000 late currency to the persons entitled thereto, cease and determine, and (as the defendants are the only persons now in receipt of such quit rent) that upon the lodgment of £5000 in Court, those quit rents shall be put in charge of the proper officer, and shall thenceforth be collected for the use of Her Majesty. Proper directions will be given for ascertaining the parties entitled to the fund brought into Court.

We have carefully considered the question of costs. Even if the defendants had not relied upon the invalidity of the condition, it would have been necessary, by reason of the complexity of the title to the money, that an information such as the present should be filed; and, having regard to the terms of the grant and the length of time that has elapsed since its execution, I should in that event have thought that the Crown should have paid the defendants' general costs of the suit. Upon the other hand, all the additional costs caused by insisting upon the untenable defences relied on ought to be paid to the Crown by the defendants; and instead of directing a taxation which would be complicated, I think the justice of the case will be met by directing that each party shall bear his own costs down to and including the present hearing.

Ross, J.
1906.

Feb. 5, 7-9, 12-16, 19-23, 26-28.
Mar. 1, 29.

ALDRITT *v.* MACONCHY AND OTHERS.

(1904. No. 1010.)

Mortgage—Purchase for valuable consideration without notice—Constructive notice—Independent solicitor—Past consideration—Innocent trustee—Fraud.

A., who was found as a fact to be a person of limited intelligence, and incapable of understanding the effect of legal instruments, was induced by the fraud of his agent F., to assign, by deed in 1892, all his property to F., subject to and in consideration of (*inter alia*) an annuity of £200, payable to him for life. In the present action, brought by the heiress-at-law and personal representative of A., this deed was set aside.

F., in 1896, mortgaged the property to a bank, A. joining in the deed to postpone his annuity. The bank, who had no knowledge of the state of A.'s intelligence, or that the deed of 1892 was procured by the fraud of F., but who were put on inquiry by facts appearing on the surface of the deed of 1892 and by other circumstances within their knowledge, made no inquiry, and allowed A. to execute the deed without being represented by an independent solicitor:—

Held, that, as against the plaintiff, the bank could not rely on the defence of purchase for valuable consideration without notice.

F. mortgaged the property in 1901 to M. to secure a sum of £8000, then due by F. to M. M. had no notice of the infirmity of F.'s title, and made no inquiry:—

Held, that M., being a purchaser for a past consideration, had no equity sufficient to prevail against the plaintiff's title.

In 1886, I. and R., co-trustees of F.'s marriage settlement, advanced £500 of the trust moneys to A. on a mortgage of A.'s property, thereby enabling F. to defraud A. of the said sum of £500. I. had no knowledge or notice of the state of A.'s intelligence:—

Held, assuming R. to have had such knowledge, and to be guilty of a fraud, that such fraud could not be imputed to I., and that the mortgage could not be set aside by the plaintiff.

Trial of Action.

The facts, so far as they are material to the present report, appear in the judgment, and in the following extracts from the pleadings.

The plaintiff by her statement of claim stated (*inter alia*) :—

Denis J. H. Coates died intestate, and without having been married, on 31st January, 1903. On 20th June, 1903, the plaintiff obtained letters of administration to the personal estate of the said Denis J. H. Coates. In the events that have happened, the plaintiff is now the heiress-at-law of Denis J. H. Coates.

Denis J. H. Coates was from his birth an idiot, and of unsound mind. By an order made by the Lord Chancellor in Lunacy, dated 5th July, 1902, he was declared to be of unsound mind, and incapable of managing his person and property.

By deed dated 17th April, 1884, Denis J. H. Coates purported to demise the lands of Corkeragh and Staplestown to Fleetwood Rynd, by way of mortgage, to secure the repayment of such sums as might then, or at any future time, be or become due on foot of advances (not exceeding £1000) made by Fleetwood Rynd to Denis J. H. Coates.

By deed dated 20th March, 1886, Denis J. H. Coates purported to demise the said lands for the term of 1000 years to William Henry Izod and Robert F. Rynd, by way of mortgage, to secure the sum of £500.

Fleetwood Rynd was the land agent of the said Denis J. H. Coates. Denis J. H. Coates was all his life a person of weak understanding, and of unsound mind. He was wholly incapable of understanding or transacting business matters, and both he and his property during his lifetime were under the complete control and dominion of Fleetwood Rynd, who paid him from time to time small sums of money, but never in truth accounted with him for the rents of the said lands, but managed the same as if he himself were absolute owner, merely supplying the said Denis Coates with the necessaries of life. Denis Coates was regarded and treated as a simpleton, and his condition was well known in the neighbourhood. These facts were within the knowledge of the said Robert F. Rynd at the date of the execution of the mortgage of 20th March, 1886.

By deed dated 22nd September, 1892, reciting that the sum of £1000 was then due and owing to Fleetwood Rynd on the security of the mortgage of 17th April, 1884, and that, in addition, Denis J. H. Coates was indebted to Fleetwood Rynd in the sum of £653

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on foot of accounts stated and settled between them, Denis J. H. Coates, in consideration of the release of the said sums, and in consideration of an annuity of £200 to be charged on the lands, to be paid to him for life by Fleetwood Rynd, granted the said lands to Fleetwood Rynd, subject to the said annuity of £200. Fleetwood Rynd never paid or accounted for the said annuity, and there never was, in fact, any account stated and settled between Fleetwood Rynd and Denis J. H. Coates.

By deed dated 21st August, 1896, and made between Fleetwood Rynd, Denis J. H. Coates, and the National Bank, Limited, reciting that Fleetwood Rynd had agreed to grant a legal mortgage to the Bank of the said and other lands, and that Denis J. H. Coates had agreed to join in the deed for the purpose of postponing his annuity, the said Fleetwood Rynd and Denis J. H. Coates purported, as beneficial owners, to demise to the Bank, by way of mortgage, all the said premises. The said deed was obtained by the undue influence and fraud of Fleetwood Rynd, and no consideration whatever was given by Fleetwood Rynd or the Bank to Denis J. H. Coates for joining in the same. The said deed was executed by the said Denis J. H. Coates without independent advice and protection; and he was at the time an imbecile, and incapable of understanding the purport and effect thereof.

By deed dated 31st August, 1901, and made between Fleetwood Rynd and the Earl of Mayo, Fleetwood Rynd purported to convey the said lands, amongst others, by way of mortgage, to the Earl of Mayo to secure the sum of £8000 then due, and such further sum as should be ascertained to be due, by Fleetwood Rynd on foot of certain agency accounts.

The plaintiff claimed (*inter alia*):—

That the indentures of mortgage dated 17th April, 1884, 20th March, 1886, and the conveyance of 22nd September, 1892, should be set aside as fraudulent and void.

A declaration that the said several indentures of mortgage dated 17th April, 1884, 20th March, 1886, 21st August, 1896, and 31st August, 1901, were void and inoperative as regards the lands of Corkeragh and Staplestown, and that the plaintiff was entitled to the said lands, discharged from all claims under the said mortgages.

The defendants, other than the assignees in bankruptcy of Fleetwood Rynd, by their several statements of defence, denied that Denis J. H. Coates was from his birth, or at any time of his life, an idiot or of unsound mind; or that he was at the time of executing the said deeds of unsound mind, or incapable of understanding the said deeds. They denied that the said deeds were obtained by undue influence or fraud on the part of Fleetwood Rynd, or that no consideration was given to Denis H. J. Coates for joining in the deeds, or that the same were executed without independent advice or protection, or that he was an imbecile or incapable of understanding the purport or effect of the said deeds. The defendants further pleaded that they had no notice or knowledge of any of the aforesaid alleged matters, and raised the defence that they were *bona fide* purchasers for valuable consideration without notice.

Samuels, K.C., O'Connor, K.C., G. Y. Dixon, and *J. Craig Davidson,* for the plaintiff.

The Solicitor-General (*Redmond Barry, K.C.*), *The Right Hon. J. H. Campbell, K.C., Moore, K.C.,* and *Longfield,* for the defendant, the Earl of Mayo.

The Right Hon. J. H. Campbell, K.C., Herbert Wilson, K.C., and *A. C. Meredith,* for the defendants, the National Bank, Limited.

Matheson, K.C., Jellett, K.C., and *Darley,* for the defendants, W. H. Izod and Robert Fleetwood Rynd.

Ronan, K.C., Chaytor, K.C., and *W. G. Gibson,* for other defendants, as against whom the action was withdrawn.

The following cases were cited for the plaintiff:—On the point that notice to one trustee is notice to all: *Wyse* v. *Wyse* (1); *Ward* v. *Duncombe* (2); *Freeman* v. *Laing* (3); *Dutton* v. *Thompson* (4); *Geddis* v. *Semple* (5). As to agent and principal: *Hassard* v.

(1) 2 Jo. & La. 403.
(2) [1893] A. C. 369.
(3) [1899] 2 Ch. 355.
(4) 23 Ch. D. 278.
(5) [1903] 1 I. R. 80.

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Smith (1); *Price* v. *Berrington* (2); *Molony* v. *Kernan* (3); *Dunbar* v. *Tredennick* (4); *King* v. *Anderson* (5); *Slator* v. *Nolan* (6). Mortgages to a bank: *Heath* v. *Crealock* (7). Notice and inquiry: *Robson* v. *Flight* (8); *Ware* v. *Egmont* (9); *Bailey* v. *Barnes* (10); *Oliver* v. *Hinton* (11); *Taylor* v. *Blakelock* (12); *London Joint Stock Bank* v. *Simmons* (13). Past consideration: *Maitland* v. *Irving* (14); *Archer* v. *Hudson* (15); *Blackie* v. *Clark* (16); *Woodroffe* v. *Johnston* (17); *Crofts* v. *Feuge* (18); *Plumb* v. *Fluitt* (19). Also the following: *Elliott* v. *Ince* (20); *Baker* v. *Bradley* (21); *Smith* v. *Chichester* (22); *Jones* v. *Smith* (23); *Whitbread* v. *Jordan* (24); *Tarbuck* v. *Bispham* (25); *Pillgrem* v. *Pillgrem* (26); *Slump* v. *Gaby* (27); *Dickinson* v. *Burrell* (28).

For the defendants: *Agra Bank* v. *Barry* (29); *Harrison* v. *Wiltshire* (30); *Adair* v. *Carden* (31); *Gainsborough* v. *Watcombe Terra Cotta Co.* (32); *Hunter* v. *Atkins* (33); *Kingsland* v. *Barnewall* (34); *Atkins* v. *Delmege* (35); *Campbell* v. *Hooper* (36); *Baxter* v. *Earl of Portsmouth* (37); *Joyce* v. *De Moleyns* (38); *Danby* v. *Coutts* (39); *Penny* v. *Watts* (40); *Imperial Loan Co., Limited,* v. *Stone* (41); *Niell* v. *Morley* (42); *Colyer* v. *Finch* (43); *Hunter* v.

(1) I. R. 6 Eq. 429.
(2) 3 Mac. & G. 486.
(3) 2 Dr. & W. 31.
(4) 2 B. & B. 304.
(5) I. R. 8 Eq. 625.
(6) I. R. 11 Eq. 367.
(7) L. R. 18 Eq. 215; 10 Ch. App. [22.
(8) 4 De G. J. & Sm. 608.
(9) 4 De G. M. & G. 460.
(10) [1894] 1 Ch. 25.
(11) [1899] 2 Ch. 264.
(12) 32 Ch. D. 560.
(13) [1892] A. C. 201, at p. 223.
(14) 15 Sim. 437.
(15) 7 Beav. 551.
(16) 15 Beav. 595.
(17) 4 Ir. Ch. R. 319.
(18) *Ibid.* 316.
(19) 2 Anst. 432 (quoted, Ir. R. 6 Eq. at p. 160).
(20) 7 De G. M. & G. 475.
(21) *Ibid.* 597.
(22) 2 Dr. & W. 400.
(23) 1 Hare, 43.
(24) 1 Y. & C. Exch. 303.
(25) 2 M. & W. 2.
(26) 18 Ch. D. 93.
(27) 2 De G. M. & G. 623.
(28) L. R. 1 Eq. 337.
(29) I. R. 6 Eq. 128; L. R. 7 H. L. [135.
(30) 4 L. J. Ch. 30.
(31) 29 L. R. Ir. 469.
(32) 54 L. J. Ch. 991.
(33) 3 Myl. & K. 113.
(34) 4 Bro. P. C. 154.
(35) 12 Ir. Eq. R. 1.
(36) 3 Sm. & G. 153.
(37) 5 B. & C. 170.
(38) 2 Jo. & La. 374.
(39) 29 Ch. D. 500.
(40) 2 De G. & Sm. 501.
(41) [1892] 1 Q. B. 599.
(42) 9 Ves. 478.
(43) 5 H. L. Cas. 905.

Walters (1); *Phillipps* v. *Phillips* (2); *Re Bobbett's Estate* (3); *Re Efrench's Estate* (4); *Bassett* v. *Nosworthy* (5); *Cave* v. *Cave* (6); *Greenslade* v. *Dare* (7); *Kennedy* v. *Green* (8); *Molton* v. *Camroux* (9); *Montefiore* v. *Browne* (10); *M'Mackin* v. *Hibernian Bank* (11); *Cobbett* v. *Brock* (12); *Bainbrigge* v. *Browne* (13); *Kenney* v. *Browne* (14); *Scholefield* v. *Templer* (15); *Mitchell* v. *Homfray* (16); *O'Connor* v. *Foley* (17); *De Montmorency* v. *Devereux* (18); *Armstrong* v. *Armstrong* (19); *Wilde* v. *Gibson* (20); *Re Tetley* (21).

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Ross, J.:—

March 29.

The plaintiff in this action is the heiress-at-law and personal representative of Denis James Henry Coates. She seeks to set aside certain deeds dealing with his property.

The deeds are impeached, first, on the ground of mental incapacity of Denis James Henry Coates, which is alleged to have been known to the grantees; and, secondly, on the ground that the deeds were executed by the fraud of Fleetwood Rynd, and that such fraud was known to the grantees. Fleetwood Rynd is a defendant; he has put in no defence, and he has left the country. His assignees in bankruptcy have put in no defence. In respect of a mortgage executed by Denis James Henry Coates in 1883 for £3000, called the Story mortgage, and in respect of a mortgage, dated 16th April, 1884, called the Wallis mortgage, the case has been abandoned. The only defendants remaining with whom we have to deal are, first, Colonel Izod and Major Robert Rynd, who are the trustees of a mortgage of 20th March, 1886; secondly, the National Bank, whose claim is under a deed dated 21st August,

(1) L. R. 7 Ch. App. 75.
(2) 4 De G. F. & J. 208.
(3) [1904] 1 I. R. 461.
(4) 21 L. R. Ir. 283.
(5) 2 W. & T. L. C. 153.
(6) 15 Ch. D. 639.
(7) 20 Beav. 284.
(8) 3 Myl. & K. 699.
(9) 4 Ex. 17.
(10) 7 H. L. Cas. 241.
(11) [1905] 1 I. R. 296.
(12) 20 Beav. 524.
(13) 18 Ch. D. 188.
(14) 3 Ridgw. P. C. 462.
(15) 1 Johns. 155.
(16) 8 Q. B. D. 587.
(17) [1905] 1 I. R. 1.
(18) 7 Cl. & F. 188.
(19) I. R. 8 Eq. 1.
(20) 1 H. L. Cas. 605.
(21) 3 Manson, 321.

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1896; and, thirdly, the Earl of Mayo, who claims under a deed executed on 31st August, 1901.

The case is one of the utmost difficulty, involving questions of fact and of law. The person with whom we are concerned principally—Denis J. H. Coates—was born on 25th August, 1840, and died on 31st January, 1903, aged about 62. The evidence is conversant with this gentleman's history from his school days till his death. All he did or said from the cradle to the grave is more or less relevant. This is not the case of a will, where a testator must contemplate parting with all his property at the time of death, in favour of those who can give him nothing in return. It is the case of an unmarried man, with no family connexions, with few wants, living at his home at little expense, entitled to a property that should have brought in an income of five or six hundred a year, clear of all outgoings. This gentleman, without any necessity, by a series of deeds, deprives himself of all the landed property he possesses, and dies—while under the care of the Lord Chancellor as a lunatic—leaving no assets. It is not alleged that Mr. Coates was a madman in the ordinary acceptation of the term. There is no evidence of mania or delusions. There is very little evidence of eccentric or irrational acts and words. The theory that Mr. Coates was an idiot on the view is not supported by the evidence. Mr. Coates recognised people, remembered their names, inquired after them when they had left the locality, and could give intelligent answers to simple questions. The plaintiff's case, as developed in the evidence, is that there was an absence of mental power, a total want of initiative, no real power of comprehension, and a very limited ability to resist the will of others. Mr. Coates lived with his father and mother in Kingstown, and attended Dr. Stackpoole's school as a day-boy. On leaving school he did not enter any university, and adopted no business or profession. He lived in Kingstown till about the year 1870, when he went with his parents to reside at Staplestown, Co. Kildare. His father died in 1880, and his mother had predeceased her husband. He was the only child of the marriage, and entitled to the property.

Mr. Christopher Rynd had, during the life of Mr. Coates' father, been the agent and manager of the property. When he became old, his son, Fleetwood Rynd, succeeded him in the agency, and

had the entire management of the house and its surroundings. Mr. Fleetwood Rynd appears to have engaged and paid the servants. Mr. Coates had practically nothing in the way of work to do, and he had no taste for field-sports or other amusements. He did not associate with any people in his own condition of life. The Rev. Mr. Rea, rector of the parish, used to call on him; but he never attended church, except on two or three occasions after the rector came to the locality.

I shall have occasion afterwards to examine minutely his habits, and his mode of life. In the end of the year 1901 an event of importance occurred. Major Robert Rynd, a brother of Fleetwood Rynd, lived at Black Hall, which was some miles distant from Staplestown. Mr. John Walker was a solicitor acting for Major Robert Rynd. In October, 1901, it became known that Fleetwood Rynd was in embarrassed circumstances. Soon after he was made a bankrupt. After the bankruptcy, Mr. Walker, at the request of Major Rynd, went to Mount Armstrong, Fleetwood Rynd's residence, and saw Mr. Coates there for the first time on 10th November, 1901. He found him in a miserable condition, unwashed, uncared-for, and, in his opinion, an imbecile. Shortly afterwards Mr. Walker went to Staplestown, and found Mr. Coates in the same condition as when he saw him first. He alleges that the house was in a very wretched and neglected condition, and that it contained hardly any furniture. Mr. Walker obtained from Mr. Coates a nominal authority to act for him, which he says Mr. Coates signed without any comprehension of its meaning. After consultation with Major Rynd, and with his concurrence, Mr. Walker decided to put Mr. Coates under the care of the Lord Chancellor. [The judgment is next conversant with the medical evidence submitted to the Lord Chancellor.]

On the 5th of July, 1902, the Lord Chancellor made an order declaring Mr. Coates to be of unsound mind, and incapable of managing his person and his property. [The judgment here deals with the expert medical evidence adduced on behalf of the defendants.]

I am not qualified to decide as between the doctors in the matters on which they differ; but it is plain that, assuming the facts stated in the evidence of Sir Thomas Myles and Doctor

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Lentaigne to be true, Mr. Coates was, at the end of 1901, of unsound mind, incapable of managing his affairs or his person. I am perfectly satisfied that Sir Thomas Myles and Dr. Lentaigne have truthfully and accurately stated what occurred on the occasion of Mr. Coates' visit to them. On their theories as to the nature of the dementia, or the length of its duration, I am not qualified to form an opinion, and I must, therefore, put them aside, except in so far as they are supported by other evidence. Counsel for the defendants will not admit that even then there was unsoundness of mind. It was thrown out, on cross-examination, that witnesses were coming to show that Mr. Coates was playing with the doctors. The case closed, and no such witnesses appeared.

I have here got something to start with. I hold it proved as a fact that Mr. Coates was of unsound mind in the end of 1901. The deeds sought to be set aside were executed in the years 1884, 1886, and 1896. The question I have to decide is whether the unsoundness of mind that undoubtedly existed at the end of 1901 and 1902 was existing and operative during these earlier years. [The judgment here deals with the evidence relating to the early life of Mr. Coates, and minutely analyses and contrasts the evidence of the local country witnesses.]

What are we to glean from all this mass of evidence? The conclusion that Mr. Coates was a lunatic or an idiot, on the view, must be abandoned. That he had the shrewdness and intelligence which mark the ordinary Irish farmer cannot be asserted. He was dull of apprehension; he had practically no initiative. He was content to loaf all his time away about the roads, and at Farrell's publichouse; and yet nobody says he was a drunkard. He was always good-natured; ready to exchange the usual greetings with the people he met; and there was nothing demonstrative in his manner. He was gentle and quiet, just as he had been during the five years he had spent at Stackpoole's School, in his youth. He was by no means ready to trust the poorer class of his neighbours in money matters; he had evidently been brought up to refuse them when they made demands. He would not authorize a reduction of rent; he could remember the amount of a tenant's rent; and the amount to be paid for a cow's grazing during the season. He was able, with the aid of Kinley, to complete the

purchase of the colt for £15. He could pay for small services, such as one shilling each to the men who completed the mowing of the meadows. He could make the necessary payment to the man who supplied an additional horse, and did a little ploughing. He quite understood the effect that the service of the summons was likely to have on the trespassers on his land. He could point out what fields were to be auctioned. He could conduct himself with decorum on Grand Juries at Quarter Sessions, on an Assizes petty Jury, and on coroners' juries. No persons who served along with him were called to show how he behaved on these juries; but if they had been, I doubt if their evidence would have been of much importance. It would probably have been to the effect that he did nothing absurd; that he wrote his name when requested to do so; and said little or nothing. [The judgment next deals with the evidence of a superior class of witnesses—doctors, business men, the rector of the parish, and solicitors—and next refers to the deeds and documents.]

The defendants' real case rests on the intelligence exhibited by Mr. Coates in executing deeds that deprived him of all his property. [The judgment next deals with the evidence of Mr. Coates' solicitors, Mr. Rooke and Mr. Meredith.]

I have to ask myself—Is it conceivable or possible that a man mentally incapable of taking care of his property could have passed through these interviews without being discovered to be what he was? But such things have happened. I do not allude to cases where a man with an insane delusion goes through an interview with a solicitor or doctor without having his weakness discovered. I allude to cases where men suffering from a form of brain-softening instruct solicitors to prepare wills, and it is afterwards proved to demonstration that the client had not testamentary capacity. It has occasionally occurred. The fact that a man received the assistance and advice of a solicitor, though of enormous—nay, rather of overwhelming—importance, is not an absolute guarantee of his capacity under all circumstances.

After a close observation of the demeanour of the witnesses, and after much consideration of the evidence and the documents, I am driven to the conclusion that, whether it was the result of a disease or not, Mr. Coates had never more than a child's intelli-

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gence; that his brain never developed; that he had no initiative; hardly any will-power; that he was wholly incapable of understanding the effect of the legal instruments executed by him upon his property, no matter how they were explained; and, that he had no conception of the value of his property, or the results to himself of its loss; that he was incapable of taking care of his property or his person. His mind, as regards persons superior to him, was purely receptive, and simply responded to their suggestions as the drum answers to the tap of the drumstick. I do not pronounce him a lunatic, or what is generally known as an imbecile. I have kept before me the possible solution that it might be the case of a weak mind, affected by undue influence and fraud. I cannot bring myself to accept that solution of the difficulty, or any solution other than what I have stated. In arriving at this conclusion, I do not forget that the defendants are fighting at a great disadvantage, and that they had no opportunity of medical examination of Mr. Coates. On the other hand, I can give no weight to the suggestion that the whole case is the concoction of Mr. Walker, and that he intentionally kept back the proceedings till after the death of Mr. Coates.

One other matter of fact I have to deal with, and it concerns Major Rynd, the brother of Fleetwood Rynd. He was, as we have seen, the trustee with Colonel Izod of Mr. Fleetwood Rynd's marriage settlement, and invested Mrs. Rynd's fortune of £500 on the mortgage of 1886. In the case of the lunacy proceedings, Major Rynd wrote to Mr. Walker the following letter:—

"BLACKHALL, SALLINS,
"16 *June*, 1902.

"MY DEAR WALKER,—There cannot be any question about Denis Coates. I have known him all my life. He was always a lunatic, and no more able to look after himself than a child. I hope you will be able to secure that he shall have all he wants during his lifetime. I would rather not be active in any law proceedings. I will keep him supplied with vegetables, and do anything I can for him.

"Very faithfully yours,
"R. F. RYND."

Now this letter is not evidence against any of the defendants,

except Major Rynd himself and his co-trustee. It is not substantive evidence, and it only becomes evidence, because it is an admission. I have not allowed it at all to influence my mind on the question of Mr. Coates' mental capacity. The legal effect of it, I shall discuss presently. We have seen that, by the deed of the 21st August, 1896, Fleetwood Rynd gave a legal mortgage of certain lands, including those formerly belonging to Mr. Coates, and Mr. Coates joined in the deed for the purpose of postponing his annuity. On the 31st August, 1901, just before his bankruptcy, Fleetwood Rynd mortgaged all his real estate, including these lands, to the Earl of Mayo to secure £8,000 then due, and such further sum as should be ascertained to be due by the said Fleetwood Rynd on foot of certain agency accounts.

I shall now proceed to deal with the law of this case. That a deed should be binding on a party, he must have an agreeing mind. If his mind be incapable of understanding the nature of the act he does, he cannot be bound by a contract. As a rule, a person of unsound mind is supposed to be unable to bind himself by any contract. He is, however, like an infant, capable of contracting for necessaries. Moreover, the necessities of society have required the law to go much further. It is wholly intolerable that persons who are of unsound mind, but not visibly and manifestly so, should be allowed to repudiate executed contracts, that they should be allowed to mortgage their property for money and then demand back the property without restoring the money. In Storey's Equity Jurisprudence, 2nd ed., s. 227, we find an observation that goes to the root of the matter. "The ground upon which Courts of Equity now interfere to set aside the contracts and other acts, however solemn, of insane persons is fraud." If the transaction has been made in good faith, if no advantage has been taken of the insane person, a Court of Equity will not help him to get back the property without restoring the money he has received. This, as Lord Cranworth said, is a doctrine of necessity, and a contrary doctrine would render all dealings between man and man unsafe.

It is said on behalf of the plaintiff that this doctrine cannot apply in a case where one of the contracting parties knows

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that he is dealing with a person of unsound mind. This leads me at once to the consideration of the circumstances connected with the mortgage of 20th March, 1886, from Mr. Coates to Colonel Izod and Major Robert Rynd.

The money to be invested was Mrs. Fleetwood Rynd's fortune. There is no evidence that she knew of her husband's fraud, or of Mr. Coates' unsoundness of mind. Her money was given in return for the mortgage, and the plaintiff does not offer to restore it. It was paid by her solicitor into the proper hand to receive it, namely, to Mr. Coates' solicitor, Mr. Rooke. No advantage whatever was taken of Mr. Coates. In the case of Colonel Izod, he knew that Mr. Coates had stated through his solicitor that he required a loan of £500. Mr. Maunsell, his solicitor, was satisfied with the security, and the money was advanced. But it is said the other trustee, Major Rynd, knew at the time of the deed that Mr. Coates was a lunatic, and with that knowledge he concurred in advancing the money. Notice to him, they contend, was notice to the other trustee, and all parties interested in the trust, in consequence whereof, they say, the trust funds are lost. Now I do not think that the cases cited have any bearing on the question. These are mainly cases where assignees as amongst themselves acquire a priority in consequence of their giving notice to all or some of several trustees. This case is wholly different.

If Major Rynd obtained this charge from an insane man upon his lands, knowing him to be insane, it was a fraud, and a very foolish fraud. He advanced the trust money on what constituted no security at all. Nobody has alleged that he was a party to Fleetwood Rynd's frauds on Mr. Coates. All the difficulty he has got himself into in this action is caused by his somewhat reckless efforts to help Mr. Coates in his time of great need. Now in contractual matters notice given to agents is very rightly imputed to the principal; but in a case of fraud, it is altogether different. Fraud in its nature implies an intention to do wrong by deception. The intention must be personal, and therefore cannot be imputed. But what is the nature of the fact alleged to be known to Major Rynd? Nobody says now that in 1886 Mr. Coates was a lunatic, on the view. We arrive at a

conclusion as to his incapability after much consideration of his mode of life, and his history. Major Rynd had nothing very important to do with him. We have no substantive evidence that he knew that Mr. Coates was a lunatic.

Courts must be very slow to allow trust moneys to be lost on admissions made by trustees, long after the investment has been made. One must consider the type of man who makes the admission, and the circumstances under which he makes it. From the evidence itself, taken on commission, anybody can see that Major Rynd is most imprudent of tongue; that he jumps to rash conclusions; that there is a great deal of the impetuous soldier and fox-hunter about him still. He found Mr. Coates at the end of 1901 beyond doubt insane; he was filled with pity for his condition; he knew very well who had robbed this most trustful of human beings of everything. Mr. Coates could no longer claim a roof to protect him, clothes to cover him, or food to support him. Major Rynd went, I might almost say, recklessly to his relief, and dashed off a letter to the effect that he had known Mr. Coates all his life, and that he was always a lunatic, and no more able to look after himself than a child.

His evidence given on the commission that he did all this with deliberation, because desperate cases require desperate remedies, could impose on nobody except himself. Even if the notice to him were notice to the other trustee, I should not allow the trust to be defeated on evidence consisting of a reckless, exaggerated admission made at a late period. I am not by any means satisfied that at the date of the mortgage Major Rynd knew that Mr. Coates was incapable. The suit, in so far as it seeks to set aside this deed of 1886, fails on all grounds. I accordingly dismiss it; and as the costs ought to follow the event, I dismiss it with costs.

That Fleetwood Rynd was aware of Mr. Coates' unsoundness of mind I have no manner of doubt. When he wanted Mr. Coates to do anything, he wrote him an intelligent letter. There is nothing unusual in that. People of weak mind, such as old men in their dotage, are quick to notice that they are treated differently from other people, and always resent such treatment. As between Mr. Coates and Mr. Rynd the deed of 1892 could

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not stand. It was the deed of a man incapable of understanding it, and its execution was procured by the fraud of Fleetwood Rynd.

I now come to consider what was the position of the National Bank when they took the mortgage of the 21st August, 1896. The officials of the Bank did not know that Mr. Coates was of unsound mind, or that the deed of 1892 was procured by the fraud of Fleetwood Rynd. They claim to be in the position of purchasers for value without notice. Now in this case the legal estate was outstanding, but in the view I take I do not think it material to discuss the cases cited further than to say that I assume the defence of purchase for value without notice can prevail in a case where the purchaser has not got in the legal estate. What I have to consider is what notice the Bank had of the infirmity of the deed of 1892. I refer to the words of Lord Cranworth in the following passage from *Ware* v. *Lord Egmont* (1) :— "Where he (*i.e.* the purchaser) had not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question."

Now the Bank had before them the deed of 22nd September, 1892. Was there anything in that deed to put them on inquiry? Counsel for the Bank admit that there was something within the four corners of that deed to put the Bank on inquiry, and that the Bank made no inquiry whatever. It appeared in the deed that a fiduciary relationship existed between the parties; it further appeared that, although the principal consideration for the deed was the release of the debt of £1653 8*s.* 4*d.* alleged to be due by Coates to Rynd (£1000, part of such debt, being secured by the mortgage of 1884), the end of the deed contains a proviso that nothing therein was to merge or extinguish the mortgage of 17th April, 1884—that is to say, that, notwithstanding the extinction of the debt, the mortgage is to be a charge superior

(1) 4 De G. M. & G. 460, at p. 473.

to the annuity. But there was more. The Bank had knowledge outside the deed. A glance at their own bill account, as it stood on the 21st August, 1896, must have made them very suspicious of the entire transaction. There was something more still. The Bank had Johnstone's valuation of the land in their possession at the time, and might have been put on inquiry as to the inadequacy of the consideration. In the case of negotiable instruments, the law lays on the transferee no obligation of making any inquiry into the title of the person whom he finds in possession. But I find that, even in the case of negotiable instruments, Lord Herschell, in *The London Joint Stock Bank* v. *Simmons* (1), uses the following language:— "Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different. The existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if, on inquiry, the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting."

The learned Counsel for the Bank, while admitting that the Bank was put on inquiry, contend that, if the Bank had made inquiry, the inquiry would have led to no result. But the answer to that is, that nobody knows what would have been the result of a proper inquiry.

In Story's Equity Jurisprudence, 2nd ed., p. 260, we find the law thus stated:—"When a man is put on inquiry, if he makes reasonable inquiry, and is deterred by a false answer, he is excusable, if it be of a character to delude a prudent man. But if he makes no inquiry, he is not to be excused on the ground that a false answer, or one leading to no result, would have been given if he had inquired."

Again, in Kerr on Fraud, p. 232, "If a man abstain from inquiry when inquiry ought to have been made, it is immaterial that the neglect to make inquiry may not have proceeded from any wish to avoid knowledge. It may be that inquiry might not have brought out the truth; but a man who abstains

(1) [1892] A. C. 201, at p. 223.

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from inquiry when inquiry ought to have been made, cannot be heard to say so, and rely on his ignorance." The same principle appears in *Oliver* v. *Hinton* (1).

I am therefore of opinion that, having made no inquiry whatever under circumstances sufficient to excite strong suspicion, the Bank cannot rely on the equity of a purchase for value without notice. There is a part of the deed of 21st August, 1896, that in no view of the case ought to be allowed to stand. I refer to so much of the deed as postpones Mr. Coates' annuity of £200. It appears to be the custom of the Bank, and indeed of other Irish Banks also, in cases where the party dealing with the Bank has no solicitor, for the solicitor's department of the Bank to prepare the deed and entrust it to the manager, taking no further responsibility. The solicitor who prepares a deed or a will has constructed a dangerous weapon, and he is not justified in allowing a layman to make use of the instrument without the solicitor's supervision. In this case a letter was written by the manager to Mr. Coates. But that was a poor precaution. Mr. Coates, even if sane, was still under the control of Fleetwood Rynd, and he had no independent advice whatever.

In my opinion, for the reasons I have stated, all the Bank's securities—the deed of 17th April, 1884, the deed of 22nd September, 1892, and the mortgage of May, 1896, in so far as it purports to convey any interest in Mr. Coates' lands—must be set aside and with costs.

Lastly, I come to the defence of the Earl of Mayo. His solicitor acted with the utmost promptitude. Finding that the debt of Fleetwood Rynd to Lord Mayo was very large, and that its full extent could not be ascertained, he insisted on Mr. Rynd's execution of the mortgage of 31st August, 1901, to secure £8000 then due, and such further sum as should be ascertained to be due. He insisted on certain sums being paid within a certain time, and when they were not paid he issued a writ and recovered judgment, on foot of which execution was promptly put in force. Lord Mayo's interests were well served, and nothing could be more prompt or effective than his solicitor's action. From the very

(1) [1899] 2 Ch. 264.

nature of the case there was no time to make any inquiry whatever, except as to the names of the lands.

The mortgage was given for a past consideration. The mortgagee simply took what he could get for what it was worth. If I am right in my conclusion of fact, that Mr. Coates was of unsound mind, Lord Mayo has no equity that could prevail against the plaintiff's title. Even in the case of a grantor of unsound mind, there is something to be said for the purchaser for value without notice who is advancing his money on the faith of the deed. In the conflict of equities, which in such cases must be balanced and weighed, his equity may prevail. But in the case of a past debt there is no such equity. In an old case of *Plumb* v. *Fluitt* (1) Chief Baron Eyre makes an observation that is quoted with approval by Lord Justice Christian in *Agra Bank* v. *Barry* (2), "I wish I saw in a Court of Equity some solid distinction established between a consideration which is an old debt and a sum advanced *de novo*. There is, certainly, a great difference. In the one case the creditor jumps at any security he can get."

But supposing I were wrong in my conclusion of fact, and that Mr. Coates was of sound mind, a great deal that I have said in the case of the National Bank applies in the case of Lord Mayo. He had, it is true, no notice of the bill transactions of Fleetwood Rynd, or of the valuation of the lands which was in the possession of the National Bank; but he was just as much put on inquiry as the National Bank. He made none, and he could make none. But he can be in no better position; he took the risk; he seized the floating plank to save something, and the same consequences must follow as if he had acted after the most careful deliberation. He was put on inquiry, and no inquiry was made.

For these reasons I cannot allow this mortgage of the 21st August, 1901, to stand, in so far as it affects Mr. Coates' estate. I am very sorry that I must also give costs against him, for there is nothing in the way of blame to be attached to him or his solicitor. They were quite justified in taking the risk they did. I cannot, however, in principle, see any difference between his

(1) 2 Anst. 432.
(2) I. R. 6 Eq. 128, at p. 160.

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case and the case of the National Bank. The costs must, therefore, in the case of every party, follow the event.

Solicitor for the plaintiff: *Norris Goddard.*
Solicitor for the Earl of Mayo: *E. White.*
Solicitor for the National Bank, Limited: *W. H. Dunne.*
Solicitors for Colonel Izod and Robert Rynd: *Maunsell, Darley, & Orpen.*
Solicitors for other parties: *Montgomery & Chaytor.*

D. M. S.

Meredith, J. 1906. April 20.

IN THE MATTER OF THE ESTATE OF COLONEL C. W. WARDEN.

Land Purchase Acts—Irish Land Act, 1903—*Congested estate purchased under sect.* 6 (4)—*Expenditure thereon from Reserve Fund—Sect.* 43 (2) *and* (3)—*Recoupment—Obligation on Treasury to make regulations—Sect.* 44.

Where the Estates Commissioners proposed to purchase an estate under the provisions of sect. 6 of the Irish Land Act, 1903, which was a congested estate within the meaning of that section, and on which, in their opinion, a considerable expenditure from the Reserve Fund was expedient and necessary, and further proposed, with the consent of the owner, to certify to the Lord Lieutenant that the purchase and re-sale of the estate were desirable in view of the wants and circumstances of the tenants thereon, and, in the event of the Lord Lieutenant determining that a loss might be incurred on the re-sale thereof within the limits permissible under sect. 44, to offer to the owner a certain sum for the estate; on questions arising (1) whether, under sect. 43, it was within the sole discretion of the Treasury to give or withhold by regulations the benefit of recoupment referred to in sub-sect. 3 of that section? and (2) whether, in the event of any sums being expended from the Reserve Fund for the benefit or improvement of the estate, such sums would be made good by the National Debt Commissioners by advances to the Land Commission for repayment to the Reserve Fund, pursuant to sect. 43 (2) and (3)?

Held (1), that under sect. 43 an obligation is imposed on the Treasury to make regulations which meet the exigencies of the case, and that they are bound to fulfil this obligation; and (2) that it is the *enhanced price of parcels* consequent on improvements that is referred to in sect. 43 (3), and accordingly

that any sums expended out of the Reserve Fund on the improvement of parcels of the estate, should, if the sale of such parcels resulted in an enhanced price, be recouped in the manner provided for by sub-sections 2 and 3 of that section, to the extent represented by the increase of price of the said parcels consequent upon such improvement.

QUESTIONS submitted to the Judicial Commissioner for his decision, under sect. 23 (1) of the Irish Land Act, 1903. From the memorandum of the Estates Commissioners the following facts appeared:—The owner had entered into agreements direct with the tenants for the sale of the estate to them for sums amounting to £34,133; but, with his consent, the sale was being proceeded with as a sale to the Land Commission under section 6 of the Irish Land Act, 1903. The estate was a "congested estate" within the meaning of that section. It comprised about 23,000 acres, of which 2,298 were untenanted; and the Estates Commissioners considered that it was an estate on which a considerable expenditure from the Reserve Fund was expedient and necessary. The Estates Commissioners proposed, with the consent of the owner, to certify to the Lord Lieutenant that the purchase and re-sale of the estate were desirable in view of the wants and circumstances of the tenants thereon, and to ask the Lord Lieutenant to determine that a loss might be incurred on the re-sale of the estate, within the limits permissible under section 44 of the Act; and if the Lord Lieutenant should so determine, they proposed to offer to the vendor the sum of £34,133 for the estate.

If nothing were expended for the benefit or improvement of the estate from the Reserve Fund, and there were a loss on the re-sale of the estate, the Commissioners assumed that such loss, within the limits determined by the Lord Lieutenant and permissible under section 44 of the Act, would be credited to the Land Purchase Fund as part of the expenses of the Land Commission, as provided by sect. 44 (2). The Commissioners, however, before making an offer for the estate, desired to refer the following questions for the decision of the Judicial Commissioner:—

Assuming that the sum of £34,133 was paid to the owner of the estate, and that the Lord Lieutenant determined that a loss of 10 per cent., *i.e.* £3,103, might be incurred on the re-sale of the estate, so that the estate might be re-sold for £31,030:—

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(1.) If the Commissioners expended from the Reserve Fund, for the benefit or improvement of the estate, a sum of £3,103, and having improved the estate by this expenditure, sold parcels of the estate, enhanced in value by such expenditure to the extent of at least £3,103, to tenants or other persons at £34,133, the sum paid to the vendor, would the sum of £3,103 thus expended be re-paid to the Reserve Fund pursuant to sect. 43 (2)?

(2.) If the Commissioners expended from the Reserve Fund, for the benefit or improvement of the estate, a sum of £6,000, and having improved the estate by this expenditure, sold parcels of the estate, enhanced in value by such expenditure to the extent of at least £6,000, to tenants or other persons at £37,000, would the sum of £6,000 thus expended be repaid to the Reserve Fund pursuant to sect. 43 (2)?

Or, in case (1), would there be no re-payment to the Reserve Fund; and, in case (2), would the re-payment to the Reserve Fund be limited to the excess of the said sum of £37,030 over the sum of £34,133 paid to the vendor, *i.e.* £2,897?

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*), *the Solicitor-General* (*Redmond Barry, K.C.*), and *Edmond Coll*, for the Treasury:—

The Treasury contend that an estate cannot be benefited by the expenditure of money from the Reserve Fund while at the same time it is being benefited under sect. 6 (4). The question depends on the construction of sections 43 and 44, and especially on the meaning of the expression "enhanced price" in sect. 43 (3). Section 43 applies to all estates purchased by the Land Commission and re-sold, where money is expended by the Land Commission on improvements, and is not confined in its operation to congested estates. Sub-sect. 4 only applies to zone cases, and is intended to meet the case where the highest limit of the zones is exceeded. It fits in with sect. 1 (5). On the true construction of section 43, money taken out of the Reserve Fund must be expended without the prospect of being re-paid to that fund. Rule 12 of the Treasury Rules of April 14th, 1905, was framed on the assumption that this is the correct view of the law. Sect. 44 (3) supports this view, and means that no account is to be taken of the amount attributable

to improvements. The provisions in sect. 72 (3), with reference to Congested District Board cases, are similar to those in sect. 43 (3).

Matheson, K.C., for the vendor:—

Sect. 43 (4) expressly prohibits, in the case of non-congested estates, the taking into consideration of money expended on improvements in considering the question of increase of price. Accordingly, sub-sect. 3, when speaking of "enhanced price," does not by comparison refer to the price for which the estate was sold to the Land Commission; and, in the case of a congested estate, the question of whether or not the Reserve Fund will be recouped does not depend on whether the Land Commission have re-sold the estate at a price greater than that which they gave for it. "Price," throughout the section, means the price of the holdings exclusive of improvements.

The Solicitor-General, in reply:—

Sect. 43 (3) is the only provision in the Act dealing with recoupment, and in reference to this matter the Treasury are made the masters of the situation, as the question of recoupment depends altogether on regulations made by them. Sect. 44 (2) does not touch the question of recoupment; the entire section is ancillary to sect. 9 (2). What is the meaning of the expression "enhanced price"? In the case of estates purchased by the Land Commission under section 6, it was not contemplated that the price on re-sale should be determined at the time of purchase. In ascertaining what is the enhanced price, you must have a fixed *datum* line to go upon. If the price referred to is the price paid to the vendor for the estate, the enhancement upon that is at once ascertainable. There is no other way of fixing the basis of comparison than by reference to the price actually paid. Accordingly, in the case of congested as well as of non-congested estates, the expression "enhanced price" must refer to the price actually paid to the vendor.

MEREDITH, J.:—

I am placed in a position of difficulty by the attitude adopted by the Treasury. I was under the impression that a particular

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question of law, on the construction of the statute, was to be the subject of my decision; but the argument of counsel raises an obstacle in the way of my deciding the question of law. The Treasury rely on the regulations they have made, which would not, as they stand, enable the Land Commission to obtain recoupment on the facts as stated in the Minute of the Estates Commissioners. I entertain grave doubts as to whether, on the form of the case that has been submitted, I have jurisdiction in the absence of consent to decide whether the regulations made by the Treasury are *ultra vires* or are inadequate to satisfy the provisions of the statute. If it is open to me, I am quite willing to give my decision, and to allow the Treasury to test the question elsewhere. It is unfortunate that the Land Commission should be placed in a position in which it is impossible for them either to go forward or to go back. The matter might be set right by including, or taking as included, in the minute, the question as to whether the Treasury regulations are in complete accordance with the law or not. It might be open to counsel for the Treasury to agree with the view that the question should be decided by me on the assumption that it was involved in the Minute of the Estates Commissioners.

[*The Attorney-General*: We are satisfied that your Lordship should decide it.]

MEREDITH, J.:—

The arguments I have listened to, and followed with interest and attention, have confirmed the opinion I have long held that it is not possible to come to a correct conclusion on a question depending on the construction of different, and sometimes conflicting, or apparently conflicting, sections of a great Act of Parliament, without full and open discussion in Court. For this reason the course adopted by counsel for the Treasury to-day, of withdrawing any technical objection, and thus enabling the Court, after full discussion, to pronounce a decision as to the true construction of the Act of Parliament, commends itself to my mind. The full discussion that has taken place to-day has revealed a number of points that have hitherto escaped the notice of the most diligent students of the Irish Land Act, 1903, in which class I may include

myself. The point raised on behalf of the Treasury, that the Lords of the Treasury are masters of the situation, under sect. 43 (3), is one of great importance; one which, if I were to adopt the view presented by the law officers, would render the question of recoupment of advances made out of the Reserve Fund a matter of very great doubt and difficulty. If, as has been argued, the Act of Parliament has given no *right of recoupment* to the Land Commission, under any circumstances—if it has merely entrusted the Treasury with *power to authorize recoupment*—then the whole edifice erected by the Estates Commissioners in their Minute falls to the ground. But I do not think that Parliament has left it in the sole discretion of the Treasury to give or withhold, by regulations, the benefit of recoupment referred to in sect. 43. I am of opinion that, on the true construction of the Statute, the words of the section impose a duty and an obligation on the Treasury, which they are bound to fulfil. Sub-sect. 3 provides that "Regulations made by the Treasury *may* provide that where the Land Commission have expended money on the improvement of an estate, and, in consequence, have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners *may* advance to the Land Commission, for repayment to the Reserve Fund, such sums as represent the increase of price consequent on the improvements." The word "may" occurs twice in the sub-section. If it is to be said that the word "may" in the first clause means "may if they please," it must bear the same meaning in the subsequent clause, "The National Debt Commissioners *may* advance to the Land Commission for repayment to the Reserve Fund." Are the Land Commission, for the second time, to be left at the mercy of an outside body, by an unreserved discretion being given to the National Debt Commissioners, to act or not to act on regulations made by the Treasury? I think that the word "may" has the same meaning in both clauses. The Legislature has imposed a duty on the Treasury to provide, by regulation, for recoupment in the circumstances contemplated by the Statute where such circumstances actually exist, and, I think that, in like manner, an obligation is imposed on the National Debt Commissioners (where the statutory circumstances exist) to advance to the Land Commission, for repayment to the Reserve Fund, such sums as

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represent the increase of price consequent on the improvements. I need not refer to my judgment in the *King-Harman Estate* (1). In itself it would be of small authority, but it is based on a series of decisions, which have so cleared the air, that it appears now to be almost impossible to mistake the meaning of the word "may" in any section of an Act of Parliament. If further argument were required in the present case, I might point out that sub-sect. 1 of sect. 43 provides that the Treasury may, on the request of the Land Commission, direct the advance out of the Reserve Fund established under paragraph (*b*) of sub-sect. 2 of sect. 5 of the Act of 1891, of such sums as the Land Commission may certify to be required for the benefit or improvement, by them, of estates and untenanted land. The Solicitor-General summarized his argument in a question. According to the custom of the country I respond with a question, and I ask the learned counsel could it be held that, when the Land Commission certify that a sum is required for the benefit or improvement by them of an estate or untenanted land, the Treasury could say, "We are masters of the situation," and refuse to advance the amount required by the Land Commission. I, therefore, hold that, if the regulations framed by the Treasury are contrary to the Statute, or are inadequate to meet the requirements of the Statute, they ought to be amended. I take it that, if my view is acquiesced in, the Treasury will not place any obstacle in the way of such amendment.

I now come to the question whether the Treasury have taken the true view of sections 6, 9, 43, and 44 of the Act of 1903. I would have much preferred that the duty of determining the true construction of these sections had fallen to some other tribunal. It is certainly a case which, if I had at the first realized its importance, I would have sent elsewhere for determination. I must now decide myself what is the true intention of the Legislature as expressed in the sections I have referred to. The opinion I have formed, after the very full discussion that has taken place, is that the Treasury take much too narrow a view of the construction of these sections. They are actuated solely by the motive of seeing that the law is carried out in its integrity; but in point of fact the contest comes

(1) 38 Ir. L. T. R. 102.

to this—that the Treasury consider that, in the circumstances set forth in the Minute of the Estates Commissioners, the loss on the re-sale of the Warden estate, and on congested estates similarly situated, must be borne by the Reserve Fund, without hope of recoupment. I agree with much that has been urged by the law officers of the Crown, with regard to the difficulties of proof that may arise from the decision that I am about to give. I agree that there may be a contest between the Treasury and the Estates Commissioners as to the amount to be attributed in individual cases to improvements executed by, or under the direction of, or with the aid and assistance of, the Estates Commissioners. But the fact that the task may be, in some cases, a difficult one, is not sufficient to justify the Court in saying that the task is not to be attempted at all. According to my reading of the Act of Parliament, it ought not to be a matter of much difficulty in many, if not in the majority of cases.

As to sect. 6 (4), the meaning appears to me to be absolutely clear. The sub-section provides that "In the case of a congested estate, as defined by this section, if the Land Commission, with the consent of the owner, certify to the Lord Lieutenant that the purchase and re-sale of the estate are desirable in view of the wants and circumstances of the tenants thereon, then the Land Commission may purchase the estate for a price to be agreed upon, and in such case the condition in this section as to re-sale without prospect of loss may be relaxed to such extent as the Lord Lieutenant may determine." I attribute to this section the meaning suggested by the law officers. It is open to no other interpretation but that the Land Commission may, with the consent of the Lord Lieutenant, agree to give to the vendor a higher price for the estate than that for which they can possibly hope to re-sell the estate, in the same condition, to the tenants; and I agree that at the time the Lord Lieutenant relaxes the condition as to re-sale without prospect of loss, the price is not fixed or determined. It can only be determined when the Land Commission, having obtained the sanction of His Excellency, act under the authority of the sub-section, and agree to buy at a price agreed upon. It may be that the Land Commission will make an underestimate of the estate as it stands for the purpose of re-sale. There is nothing in the section to

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prevent them from going beyond their own estimate of the price at which they propose to re-sell. If, having given £34,000 for the estate, and having obtained the sanction of the Lord Lieutenant to re-sell at a loss of 10 per cent., they find themselves able to re-sell at a loss of not more than 6 per cent., there is nothing in the Act of Parliament to prevent them from doing so. But that does not conclude the matter at all. The price is the price of the congested estate. The price is to be agreed upon between the Estates Commissioners and the vendor, and what is to be the subject-matter of the purchase and re-sale under the section is the estate.

I now turn to sect. 44, which is the complement of sect. 6 (4) and sect. 9 (2). Section 44 (1) provides that—"On the completion of the re-sale of any congested estate purchased by the Land Commission, an account shall be prepared, showing the profit or loss in connexion with the purchase and re-sale of the whole of the congested estates purchased and re-sold up to date." Sub-section (2) provides that—"If the account shows on the whole of the transactions a net loss, that is to say, an excess in the amounts paid by the Land Commission, over the capital sums realized by the Land Commission for re-sales, interest at the rate of two and three quarters per cent., and sinking fund at the rate of ten shillings per cent. per annum on the amount of the said net loss, within a limit of ten per cent. per annum of the aggregate sums realized by the re-sale of the estates, shall, in accordance with rules made by the Treasury, be paid as part of the expenses of the Land Commission, and credited to the Irish Land Purchase Fund, until the amount of the loss is discharged."

Sub-section (3) provides that—"In calculating the profit and loss on the purchase and re-sale of congested estates, no account shall be taken of any money expended by the Land Commission for the benefit or improvement of the estates, nor of any increase of price obtained by them in consequence of such expenditure."

In my opinion, sub-section (3) relates back to sub-section (1). What I understand by sub-sect. (3) is that in taking an account of profit and loss, regard must be had to the price at which the estate was bought from the vendor, and the price at which it was

re-sold in its original condition, exclusive of, and without bringing into the account, any sums expended by the Land Commission for the benefit or improvement of the estate, or any increase of price obtained by them in consequence of such expenditure. I cannot think that the sub-section means that the Land Commission are to treat the matter as one of no importance, of "no account," in the American humorist's phrase, and are to bring into the account, for the benefit of the Treasury, the amount by which the value of the estate has been enhanced, the price having been increased by the improvements executed by them.

Take a concrete illustration. In the case before me, assuming that the purchase price is £34,133; assuming that the price for which the estate has been re-sold as it was bought is £31,030; assuming that the Lord Lieutenant has authorised the Land Commission, under section 6 (4), to incur that loss, and that it has been legitimately incurred, then I think that the excess of the amount paid by the Land Commission over the capital sum realised by the Land Commission on re-sale would come within the provisions of sect. 44 (1) and (2), and advances made out of the reserve fund for the improvement of the estate should not be taken into consideration on one side or the other.

However, that interpretation does not solve the entire difficulty. We come back to the bed-rock question of recoupment, and the question whether the amount expended under the circumstances stated in the Minute of the Estates Commissioners *can* be recovered under sect. 43 (3). There is no section in the Act dealing with recoupment except section 43 (3). I have read it, and considered it in the light of the arguments addressed to me, and it appears to me clear—so clear, in fact, that at one stage of the argument, I almost doubted whether I might not have overlooked some qualification of the plain language of the sub-section. The sub-section authorises the recoupment of advances made by the Estates Commissioners out of the reserve fund, and, in my judgment, applies in cases of non-congested estates, as well as of congested estates, whether, in the case of congested estates, the estate is re-sold in its original state at the price paid to the vendor, or is sold at a price within the limits laid down by the Lord Lieutenant, but

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below the price paid to the vendor. I have been so impressed with the importance of the case, and the necessity of having the matter disposed of at the earliest moment finally and irrevocably, here or elsewhere, so that the Estates Commissioners may know whether they can take the course that the present case indicates they desire to take, namely, to give what counsel for the Treasury describes as a double benefit to congested estates purchased by them—the benefit of sect. 6 (4), and the benefit of an advance out of the Reserve Fund—that I decided to give my decision at the close of the arguments. It is plain that the Estates Commissioners have felt a great difficulty in the matter. They have asked me to give a decision in the present case. They have indicated that they consider the matter as one of great importance. The law officers intimated that they would be glad if my decision could be given at the earliest possible moment. I, accordingly, state my opinion. I think that section 43 (3) is a section apart—a code in miniature. It provides for the case set forth in the case stated by the Estates Commissioners. I hold, as a matter of law, that the words "enhanced price," and "increase of price consequent on the improvements," relate to the enhanced price of parcels of land, or the increased price of parcels of land, consequent on the improvements. The suggestion that the recoupment of the Reserve Fund is to be tied up under Treasury regulations until the congested estates have been sold, and an account taken under section 44 (1), not merely of one estate but of every congested estate purchased and re-sold up to date, would, to my mind, be a strange thing. All difficulty, however, is removed by the Act of Parliament. Assuming that I am right in my view that the Treasury are bound to carry out, by their regulations, the object and intention of the Legislature, then the Act means what it says in sect. 43 (3). In my opinion, it is the enhanced price of the parcels consequent on the improvements, that is referred to in the section. It is only on account of the difficulty of ascertaining what is the increase of price of the parcel consequent on the improvements that I even entertained any doubt as to what otherwise appears to be so clear. The sub-section, as I have said, embraces the case of sales of non-congested estates as well as congested estates. It is plain that all must be estates purchased and re-sold by the Land Commission.

Is there in the case of a non-congested estate any difficulty in ascertaining what is the enhanced price? None whatever. The tenant has agreed to purchase, at a price, the holding as it stands. The Land Commission subsequently agree to expend money on the dwelling-house. The Land Commission agree to sell the holding at a price increased by the value of the dwellinghouse. The purchase price is enhanced to that extent, as is also the purchase annuity. It is clear that the National Debt Commissioners, in getting in the instalment annuities, are getting back the enhanced price paid by the tenant, by reason of the erection of the dwelling-house. The Legislature says that under such circumstances the National Debt Commissioners are to advance such sums as represent the increase of price. If this provision were not inserted, the result would be that so much of the annuity as represented the amount of the advance out of the Reserve Fund would go into the coffers of the State, and not to the Reserve Fund.

Is there any difference in the case of a congested estate? I see no difference.

If the Land Commission agree with the tenant to re-sell to him his holding (A) as it stands, without a dwelling-house, at a particular price, and if they agree that they will erect for him, at a certain cost, a suitable dwelling-house, and complete the agreement by inserting a proviso, that he shall pay an increased purchase price (B) for the holding with the dwelling-house, the question of what is the enhanced price is a mere matter of arithmetic. The difference between the prices (A) and (B) is the sum that must be recouped by the National Debt Commissioners to the Reserve Fund.

I think that my decision is in strict accordance with the express provisions of the 43rd and 44th sections. It appears to me that the purchase annuity in the illustration given will include a sum that is attributable to the amount advanced out of the Reserve Fund, and the Treasury would, if my decision were not correct, be getting the benefit of the portion of the annuity so attributable. I shall answer the first question, which, in my opinion, covers the entire ground, and renders it unnecessary to reply to the second.

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The following was the answer embodied in the Order :—

In the circumstances stated I hold that any sums expended out of the Reserve Fund on the improvement of parcels of the estate should, if the sale of such parcels results in an enhanced price, be recouped in the manner provided for by section 43, sub-sections (2) and (3), to the extent represented by the increase of the price of said parcels consequent upon such improvement.

Solicitor for the Treasury : *William M. Lane.*
Solicitor for the vendor : *E. C. Jameson.*

J. E. W.

Appeal. 1905.

Dec. 5, 6. 1906. Jan. 31. Feb. 1, 15.

COX *v.* DUBLIN CITY DISTILLERY COMPANY (1).

Company — Borrowing powers — Debentures — Floating charge — Power of Company to deal with property—Pledge—Priority.

A Distillery Company, with power to create debentures and to borrow on mortgage, issued debentures, and executed a trust deed to further secure the debentures. By the debentures the undertaking, and all the property, present and future, of the Company (not comprised in the trust deed) were charged with the moneys borrowed as a first charge thereon. By the conditions endorsed on the debentures, the Company was to be permitted, until default in payment of interest, &c., in course of its business, and for the purpose of carrying on same, to deal with the property thereby charged in such manner as the Company might think fit, and in particular might sell, lease, or exchange the same, pay and receive money, and might declare and pay dividends out of profits, but nothing therein should be taken to authorise the creation of any mortgage or charge on the property for the time being of the Company in priority to the charge thereby created. By the trust deed the Company mortgaged the freehold and leasehold premises of the Company to secure the repayment of the debentures to the lenders *pari passu*, and the Company covenanted to pay the principal and interest secured by the debentures, and that the same should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the Company by any means whatsoever.

The Company obtained advances from their bankers to enable them to purchase grain for the purpose of manufacturing whisky, to secure the repay-

(1) Before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

ment of which the Company pledged to the Bank certain whisky, by delivering to the Bank the warrants for the whisky, with invoices:—

Held (affirming the decision of Barton, J.), that the transaction came within the restriction against creating any mortgage or charge on the property in priority to the debentures, and the provision that the debentures should take precedence over all moneys which might be raised by the Company by any means whatsoever, and that the Bank were not entitled to the whisky against the debenture-holders.

Held, also, on further evidence produced in the Court of Appeal, which had not been given in the Court below, that the Bank had notice of the debentures, at the date of the pledge of the whisky to them, and were consequently not in the position of purchasers for value without notice.

ACTION by John M. Cox, suing on behalf of himself and the other debenture-holders, for a declaration that certain mortgage-debentures were well charged on all the property, present and future, of the Company.

The defendant Company was incorporated in the year 1890, under the Companies Acts, for the purpose of carrying on the business of whisky distillers at Dublin, Banagher, and elsewhere in Ireland.

The memorandum of association gave the Company power to borrow money secured by mortgage or debentures, charged on all or any of the property and rights of the Company.

In September, 1900, the Company raised and borrowed, for the purpose of the Company, a sum of £35,000 by the issue of 350 debentures for £100 each, and on the 20th September, 1890, the Company executed a deed for the purpose of securing the said debentures, made between the Company of the one part and Frederick Kennedy and Patrick Egan of the other part. The form of the debenture was as follows:—

"The Dublin City and Banagher Distilleries, Limited (hereinafter called the Company), will, on the 1st day of January, 1920, or on such earlier day as the principal sum of £100 hereby secured shall become payable in accordance with the conditions endorsed hereon, pay to or other registered holder for the time being hereof, his executors or administrators, the sum of £110; and the Company will, in the meantime, pay to him or them interest on the said principal sum of £100 at the rate of £5 per cent. per annum by equal half-yearly payments on the 28th

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day of February and 31st day of August in each year, the first of such half-yearly payments to be made on the 28th day of February next.

"The Company doth hereby charge with such payment its undertaking and all its property, both present and future, not comprised in an indenture hereinafter mentioned. The registered holder of the debentures for the time being, including the registered holder hereof, their and his executors and administrators, are entitled *pari passu* to the benefit of an indenture dated the 20th September, 1890, and made between the Company of the one part and Frederick Kennedy and Patrick Egan of the other part, whereby certain hereditaments and premises were vested in the trustees therein named for securing payment of the principal moneys and interest payable by virtue of such debentures.

"This debenture is issued upon, and subject to, the conditions endorsed hereon."

The conditions endorsed—so far as material—were as follows:—

"1. This debenture is one of a series of 350 like debentures issued, or about to be issued, by the Company for securing principal sums amounting in the aggregate to £35,000.

"2. The debentures of the said series shall rank *pari passu*, and without preference or priority one over another.

"3. The charge created by this debenture shall be a floating security, and, accordingly, the Company may, in the course of its business and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the Company may think fit, and in particular may sell, lease, or exchange the same, pay and receive money, and may declare and pay dividends out of profits.

"4. Nothing herein contained shall be taken to authorize the creation of any mortgage or charge, on the property for the time being of the Company, in priority to the charge hereby created.

"16. If the Company make default for a period of three calendar months in the payment of any interest hereby secured, the registered holder hereof, may at any time thereafter, before such interest is paid, by notice in writing to the Company, call in the principal moneys hereby secured, and in case any such notice is duly given or if any order of some Court of competent jurisdiction is made,

or a special or extraordinary resolution is passed for the winding-up of the Company, the principal moneys hereby secured shall immediately become payable."

By the trust deed executed to secure the debentures the Company assigned to Kennedy and Egan the freehold and leasehold property possessed by the Company to secure the payment of the debentures *pari passu*, and the Company covenanted to pay the principal and interest secured by the debentures, and that the same should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the Company by any means whatsoever.

There was a second issue of mortgage debentures to secure a sum of £25,000 on the 9th November, 1895. This was secured by a deed of that date, and the debentures were in the same form as the first issue.

The plaintiff was the holder of two debentures of £100 each in the Company. The Company made default in payment of a half-year's interest due to the plaintiff on his said debentures on the 31st August, 1904, and the plaintiff on the 4th February, 1905, served notice on the Company calling in the principal moneys secured by the said debentures. The plaintiff at the same time demanded payment of such principal money, but without success.

On the 5th February, 1905, the plaintiff brought the action.

On the 15th February, 1905, the Company passed a resolution to wind up.

The action came on for hearing before Barton, J., on the 16th March, 1905, when an order was made declaring the mortgage debentures well charged on the Company's property, and the usual accounts and inquiries were directed.

On the 15th March, 1905, the Hibernian Bank issued a writ against Cox, and the Company, and some of the directors for a declaration that the charge or pledge which they held on certain whisky of the Company was valid against the first and second mortgage debentures. This action was stayed by Barton, J., on the 30th March, 1905, and on the 19th May, 1905, the Hibernian Bank filed a claim in the present action for the purpose of enforcing their rights.

The Bank thereby claimed that the pledge made by the

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defendant Company to the Bank of the 25,638¼ gallons of pot-still whisky, bonded in the name of W. A. Craig, and the 65,885 gallons of pot-still whisky, warrants for the delivery of which (with invoices) were held by the said Bank, were valid and effectual against the first and second debenture-holders and the said defendant Company, and all persons claiming under them or any of them.

The total amount secured by the said pledge, with interest to the 3rd March, 1905, was £13,771 12*s.* 4*d.*

The Bank submitted that the pledge to them of the said whisky was paramount to any claim which the debenture-holders or any of them could have against the same; further, that the said pledge did not constitute a mortgage or charge within the meaning of the provisions of the said debentures so as to give the debentures priority thereto; and further, that the said whisky, having been manufactured from grain purchased with the moneys advanced by the said Bank to the defendant Company for such purpose, did not in equity, when manufactured and bonded, become subject to the claims of the debenture-holders under their debentures in priority to the claim of the said Bank created by the pledge; and that the debentures being only a floating charge on the said whisky did not prevent the Company, for the purposes of manufacturing their whisky and carrying on their business, obtaining advances from their Bankers in the ordinary course of business, and securing the repayment of such advances by pledging their whisky.

There were about 373,148 gallons of whisky of the estimated value of £44,697 7*s.* 6*d.*, stored in the bonded warehouses of the defendant Company on the distillery premises, the warrants of which had been lodged as pledges with the Bank and other creditors.

The claim of the Bank was adjourned into Court for hearing before the Judge.

On the 20th July, 1905, Barton, J., gave judgment, and he held that the first debentures took precedence over the claim of the Hibernian Bank, and that the Bank should hand over to the receiver the warrants in their hands. The Bank appealed, and both parties served notice of intention to use fresh evidence on the

hearing of the appeal; the fresh evidence proposed to be given by the Bank being given to show the custom of the Company in using the money advanced by the Bank to purchase materials for the manufacture of whisky; and the fresh evidence proposed to be given by the respondents being given for the purpose of proving that the Bank had notice of the debentures at the time of the pledge of the whisky. The respondents did not oppose the Bank's application to give further evidence; but the Bank strongly opposed the respondent's application. The Court of Appeal allowed the new evidence to be given under the circumstances fully stated in the judgment of FitzGibbon, L.J. (*infra*, pp. 458–462).

Ronan, K.C., O'Brien, K.C., and *A. C. Meredith*, for the appellants:—

The Bank got a legal title, by way of a pledge, to the property represented by these warrants, which is good against a purely equitable security, such as debentures, in the absence of notice. An assignment of after-acquired property is void at law, and only holds good in equity: *Joseph* v. *Lyons* (1); *Hallas* v. *Robinson* (2); *Bannatyne* v. *Ferguson* (3). A general floating charge, such as that created by a debenture, does not prevent a company from dealing with one portion of its property specifically, provided that it does not come within the prohibition of the condition endorsed on the debenture: *English & Scottish Investment Co.* v. *Brunton* (4); *Robson* v. *Smith* (5); *Brunton* v. *Electrical Engineering Co.* (6). These pledges were not "a mortgage or charge" within clause 4 of the endorsed conditions; they were simply common law pledges: *Halliday* v. *Holgate* (7); *Carter* v. *Wake* (8). Moreover, the money obtained from the Bank on the security of these pledges was used to purchase grain for the manufacture of whisky, that is for the ordinary business of the Company.

The *Bushmills Case* (9) is distinguishable from the present on several grounds—(1) There was clear proof in that case that the

(1) 15 Q. B. D. 280.
(2) *Ibid.* 288.
(3) [1896] 1 I. R. 149.
(4) [1892] 2 Q. B. 700.
(5) [1895] 2 Ch. 118.
(6) [1892] 1 Ch. 434.
(7) L. R. 3 Ex. 299.
(8) 4 Ch. D. 606.
(9) [1896] 1 I. R. 301.

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Company had notice of the debentures; (2) the fifth condition provided that nothing therein contained should authorize the creation of any mortgage or charge of or upon the said property *or any part thereof* having priority over the charge thereby created; but the words "or any part thereof" are not to be found here.

The question of notice was not raised in the Court below, and there was no proof of notice given: where a party has an opportunity of making a case in the Court below, he cannot make an entirely new case in the Court of Appeal: *Norton* v. *Compton* (1). The appellants' counsel is entitled to open the appeal on the evidence relied on, especially in a case where there are no pleadings: *Murray* v. *Bush* (2).

Matheson, K.C., Henry, K.C., Healy, K.C., and *Dickie,* for the respondent:—

It is open to a party to raise a question in the Court of Appeal, which was not raised in the Court below, if there is evidence procurable, provided that an opportunity is given to the opposite party of making any case, or giving any evidence, in answer: *The Tasmania* (3).

The case comes within the words "mortgage or charge" within the 4th condition endorsed on the debenture. It was a transfer of the whisky as security for the advances, and that amounted to an equitable charge: Comyn's Digest, vol. v., p. 148, Title, Mortgage. The case cannot be distinguished from the *Bushmills Case* (4).

Moreover, the Bank had notice of the debentures, because they held several of the debentures themselves, and once notice is proved a subsequent charge or pledge cannot prevail: *Ex parte Firth* (5).

(1) 27 Ch. D. 392.
(2) L. R. 6 H. L. 37.
(3) 15 A. C. 223.
(4) [1896] 1 I. R. 301.
(5) 19 Ch. D. 419.

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Feb. 15.

WALKER, C.:—

In this case the question which we have to decide is one of priority between the debenture-holders of the Dublin City Distillery Company and the Hibernian Bank, who hold warrants of whisky, the property of the Company, to secure advances.

The case of *Cox* v. *The Company* is an action by a debenture-holder on behalf of himself and other debenture-holders in Judge Barton's Court. It appears the Hibernian Bank also as secured creditors instituted an action in the Court of Barton, J.; but that action was stayed by an order of Barton, J., and the rights under it are being dealt with under a judgment and accounts directed in the present action in Judge Barton's Court. His judgment is dated the 16th March, 1905, and the debenture-holders and their claims, and the claims of incumbrancers and creditors, against the property of the Company are being ascertained under the accounts directed by the judgment.

It appears there is a large quantity of whisky—some 373,148 gallons—stored on the distillery premises, the warrants of which have been lodged as pledges to banks and other persons to secure advances. Amongst those persons, the Hibernian Bank hold warrants to secure advances stated to amount to £13,771 12*s.* 4*d.*; and the debenture-holders contend that this security is *puisne* to the charge of the debenture-holders.

It is too late to discuss now whether a question so important to the parties is conveniently raised by a claim in Chambers, in which there are no pleadings or formal issues knit. By the action of both parties, it has assumed that shape, and came before Mr. Justice Barton on a motion to have the question of priority decided. He was of opinion that the point was ruled in favour of the debenture-holders by decisions of this Court, and the Bank has appealed.

The first question is—what is the nature and character of the debentures issued by the Company which the respondents represent?

The first issue of debentures was of 350 mortgage debentures for £100 each, bearing interest at £5 per cent., to secure £35,000 borrowed. By deed dated 20th September, 1890, the Company demised to trustees the freehold and leasehold hereditaments

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mentioned in the schedule, upon trust to permit the Company and its assigns to hold and enjoy the premises and to carry on therein and therewith the business, or any of the businesses, authorized by the memorandum of association until default in payment of said principal moneys secured by the debentures, or the payment of some interest due for three months, or till an order of Court or resolution made to wind up the Company, or distress, or execution over or against the property, or breach of some covenant by the Company contained in the deed, and then to enter and sell, and apply the proceeds in payment first of arrears of interest, and secondly of the principal moneys due on the debentures, all *pari passu*; and by the 15th clause of this deed the Company covenanted with the trustees to pay the principal moneys and interest secured by the debentures, and that the same should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the Company by any means whatsoever.

The debentures, which were all in the same form, provided that the Company would on the 1st January, 1930, or such earlier day as the principal sum of £100 should become payable in accordance with the conditions endorsed thereon, pay the principal sum and in the meantime interest at £5 per cent. by half-yearly payments on the days named. They also contained the following clause:—

The Company doth hereby charge with such payments its undertaking and all its property both present and future, not comprised in an indenture hereinafter mentioned. The registered holders of the debentures for the time being, including the registered holder hereof, their and his executors and administrators, are entitled *pari passu* to the benefit of an indenture dated the 20th September, 1890, whereby certain hereditaments and premises were vested in the trustees therein named for securing payment of the principal moneys and interest payable by virtue of such debentures.

This debenture is issued upon and subject to the conditions indorsed hereon.

Of these conditions the material ones are the following:—

1. This debenture is one of a series of 350 like debentures

issued or about to be issued by the Company for securing principal sums amounting in the aggregate to £35,000.

2. The debentures of the said series shall rank *pari passu* and without preference or priority one over another.

3. The charge made by this debenture shall be a floating security, and accordingly the Company may, in the course of its business and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the Company may think fit, and in particular may sell, lease, or exchange the same, pay and receive money, and may declare and pay dividends out of profits.

4. Nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the property for the time being of the Company in priority to the charge hereby created.

The debentures then specified the events on which the principal money would become payable as stated in the deed.

On the 9th November, 1895, there was a second issue of mortgage debentures to secure a sum of £25,000. This was secured by a deed of that date in the same terms *mutatis mutandis* as that of 20th September, 1890, and the debentures and conditions endorsed were in the same form.

The appellants the Hibernian Bank were the Bankers of the Company, and as such made advances to the Company from time to time. In addition to other securities given to the Bank, the Company gave to the Bank warrants for the delivery of large quantities of whisky, and stated to be deliverable to the Hibernian Bank or assigns by endorsement on the warrants, and these warrants are held by the Bank, and by its claim the Bank submits that the pledge to them of the whisky is paramount to any claim which the debenture-holders can have against it; and further that the said pledge does not constitute a mortgage or charge within the meaning of the debentures so as to give them priority thereto; and further that the whisky having been manufactured from grain purchased with the moneys advanced by the Bank for such purpose, did not in equity when manufactured and bonded become subject to the claim of the debenture-holders in priority to the claim of the Bank created by the pledge; and further that the debentures being only a floating charge on the whisky did not prevent the

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Company, for the purpose of manufacturing this whisky and carrying on their business, obtaining advances from their Bankers in the ordinary course of business and securing the re-payment of such advances by pledging their whisky, and that this was involved in what was permitted by the conditions.

It has not been contended that the condition preventing the creation of any subsequent mortgage or charge is in itself invalid. The case before the Vice-Chancellor (1) proceeds upon the validity of the debentures, and that decision was affirmed in this Court. So also the case of the same Company *Ex parte Brett*, in this Court (2), assumed their validity, and the same observation applies to numerous other cases reported, of which *The Valletort Sanitary Steam Laundry Company, Limited* (3), and *Re Tasker* (4) are, so far as I know, the latest.

But, then, Mr. Ronan relied on some alleged differences in the form of the debentures from those in the *Bushmills Case* (5). The one he laid most stress on, the alleged omission of the words "by any other means whatsoever," disappears on an examination of the documents. These same words are in the covering deed in this case exactly as in the case before the Vice-Chancellor.

I attach no value to the distinction founded on the words "or any part thereof"; and inasmuch as the whisky was given to the Bank as security for advances, and is held as security, I am also of opinion it is a "charge" within the meaning of the conditions, no matter how strictly the language may be read.

Then it was said this money was advanced for the purpose of purchasing the raw material which became whisky, and, therefore, for creating whisky, and as it was necessary in the course of business to make and sell whisky, therefore it is within the permission. In the first place, there is nothing from which I can infer this from the advances. The money may have been applied for any or many purposes, and the clause prohibiting the creation of a mortgage or charge, in priority, is on its face a restriction on a dealing in the course of business. I have already, in *In re Old Bushmills Distillery*; *Ex parte Brett* (5), stated my view as to the

(1) *In re Old Bushmills Distillery; Ex parte Brydon*, [1896] 1 I. R. 301.
(2) [1897] 1 I. R. 488.
(3) [1903] 2 Ch. 654.
(4) [1905] 2 Ch. 587.
(5) [1896] 1 I. R. 301.

nature of a floating charge. I may add to it the definition by Lord Macnaghten in *Governments Stock and other Securities Investment Co.* v. *The Manila Railway Co.* (1).

There really remains only the question of notice by the Bank of the existence of these debentures and their character. I assume this question was discussed in the Court below, and also that the *onus* lies on the debenture-holders to establish it, on which I give no opinion.

We had a long discussion as to whether evidence on this question of notice should be admitted in this Court, and for the reasons given by Lord Justice Fitz Gibbon at the close of that discussion, and which will be re-stated by him now, we decided to admit it, safeguarding the rights of both parties in the fullest manner; and the result of the evidence given shows how unjust to the respondents a decision in favour of the appellants founded on the assumption of the absence of notice would have been, inasmuch as it now appears that the Bank is itself, and has been for many years, a registered debenture-holder, and further that the form of those debentures, and a proposal for an alteration on this crucial question of priority, were the subject of discussion between the Company and the Bank. It is not surprising, therefore, that we heard no more upon the question of notice, actual or constructive, once the real facts were known.

As to the reception of the evidence, I am not to be taken as expressing an opinion that the order was a final one, as distinct from interlocutory, having regard to the observations in *Pheysey* v. *Pheysey* (2), and the cases there referred to.

In result, the whole case comes round to the position in which it was before Judge Barton, and dealt with by him, and to the question whether in substance the case has been ruled already by decisions of this Court. I am of opinion that the case is within the principle of the cases already decided, and consequently that the appeal fails, and must be dismissed with costs.

(1) [1897] A. C. 86. (2) 12 Ch. D. 305.

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FITZ GIBBON, L. J.:—

I concur with the Lord Chancellor on the main question. The transaction with the Bank I treat as a *pledge*—a legal transfer of the property, and symbolically of the possession, by handing over the warrants to the pledgees. The custody of the whisky, and the access to it, were complicated by its being in bond, and inside the gates of the Company's premises. But I regard the dealing as a complete legal pledge, given as security for a debt, and creating a charge practically not distinguishable, either in effect or incidents, from a charge created by mortgage. That being so, I hold that it came within the disability, under the terms of the debentures, to create a "mortgage or charge" in priority to them, and also within the prohibition of the covenant in the covering deed, against postponing the debentures by any means whatsoever. In terms and effect the debentures and covering deed in this case are, in my opinion, undistinguishable from the similar instruments in the *Bushmills Case* (1). Under these circumstances, I assume that the legal title and possession of the Bank could not be displaced by the claim of the debenture-holders, unless notice of their rights was brought home to the Bank, and I am further willing to admit that notice should not be relied upon, unless it has been fairly alleged and fully proved.

Having regard to the course of procedure in this case, it does not seem to me to be now material to consider upon whom the *onus* of proof lay at first. The appeal was opened at length by Mr. Ronan on December 5, 1905, and as I presided on that occasion, my colleagues desire that I should now place on record an account of what then occurred. Before going into the case, Mr. Ronan informed us that both parties had given notice of application for leave to use further evidence, but that it would be convenient to state the case before offering the further evidence, so that we might better understand the bearing of it. To explain what was done, it is necessary to bear in mind the character of the appeal, having regard to the rules and practice which govern the admission of further evidence on the hearing of final and interlocutory appeals respectively. *Norton* v. *Compton* (2) on the one

(1) [1896] 1 I. R. 301. (2) 27 Ch. D. 392.

hand shows that, in a winding-up proceeding, it would be impracticable to treat every appeal upon an incidental question arising between parties interested in some particular matter as a final appeal for all purposes of the rules. For example, as to the time for appealing, which is twenty-one days instead of twelve months, and also as to the length of the notice of appeal, if every incidental appeal was treated as final, the proceeding as a whole might be disturbed, interrupted, and delayed by *parenthetical* litigation about parts of the property, to such a degree that the conclusion of the whole business would become almost impossible. Accordingly, the rules which govern the admission of further evidence on interlocutory appeals have been framed to facilitate and expedite such admission, and special leave is not required for bringing it forward.

Among the motives that led to those rules, it may well have been thought that, in a proceeding which must be taken within a limited number of days, it would be unreasonable to expect all the material evidence to have been before the Court of first instance; therefore either party is permitted, *de bene esse*, to bring forward on the rehearing any further evidence which he thinks important, without first getting leave to use it. But, of course, the admission and use of it is subject to the same control, and is governed by the same law, as if it was brought forward on a final appeal, and the Court is bound to see that no illegal or irrelevant evidence is received, and also that the opposite party is enabled to answer any new evidence, and is not taken by surprise, or placed at any disadvantage by its being produced for the first time on appeal.

The appellants case was fully opened by Mr. Ronan on December 5. He contended that the pledge to the Bank was not a "mortgage or charge" within the meaning of the debentures, and that the case was distinguishable from the *Bushmills Case* (1), and also from the other cases in which debenture-holders had been successful. When the Court was about to adjourn, he made his application for the admission of further evidence on behalf of the appellants. Mr. Matheson made no objection to the further

(1) [1896] 1 I. R. 301.

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evidence proposed, but Mr. Ronan then said that he was going to object to the respondent's application to admit further evidence, both because the question of notice was not open, and because the proposed evidence was not properly specified.

We then called on Mr. Matheson to open his application, and it appeared that there was a controversy between counsel as to how far the question of notice had been raised before Barton, J., and also that the respondent wanted to put in a mass of documents, vaguely referred to, but not verified, by a very peculiar affidavit of the respondent's solicitor. These included the debenture-register, the trust deed securing the debentures, minutes of the Company's meetings, balance-sheets of the Company, and a number of letters which had passed between the Bank and the Company relating to the pledging of the whisky.

Mr. Ronan objected to all of them; it was obvious that many of them were relevant to the issue of notice, which he contended not to be open, and on the respondent's affidavit it was impossible to say how much of the *rudis indigestaque moles* of documents to which the affidavit referred was admissible, or to what question or questions it was intended to apply it. I find on my notes that before we rose we expressed the intention of admitting all the documents under which the pledges in question were made, and any correspondence or minutes relating to the pledges, and that we directed the respondents to furnish a list of these to Mr. Ronan before we sat next day. When we sat on December 6, we found that there had been some difficulty about the list, and Mr. Ronan then insisted on his objection to the admission of any further evidence whatever for the respondents, and also contended that the question of notice had not been opened in the Court below, and could not be opened here. He referred to *The Tasmania* (1), and to the observations of Lord Cairns in *Murray* v. *Bush* (2) upon the disadvantages of dealing with a case like this on an interlocutory application, or without some formal allegation or pleading, in a litigation between adverse parties. It then transpired that an action had actually been instituted by the Bank before Barton, J., to establish its claim, and that this action had, for some reason and in

(1) 15 A. C. 223. (2) L. R. 6 H. L. 37, 56.

some way which has not yet been explained, been dropped, in order to have the rights of the parties ascertained and declared in this action before the same Judge. But it became perfectly clear to us that the case could not be decided without investigating and deciding the question and the effect of notice. Accordingly, we determined to ensure, so far as we could, that this essential part of the case should be so presented as to give to each party every advantage which he could have had if the question had been raised in a separate suit, and we made the following order:—

> "Adjourn the hearing of this appeal and the making of any rule on the respondent's notice of motion, dated November 7, 1905, with liberty, on or before the 11th inst., to serve such further or amended notice of motion, and such further affidavit or affidavits and list of particulars or exhibits as the respondent may be advised—giving copies, so far as may be required, to the appellants within the time aforesaid, the appellants to be at liberty, up to and including Friday, the 15th inst., to serve such further affidavit or affidavits, and to furnish the plaintiff with such particulars or list of documents, as the respondent may be advised to put in, in reply to *the new matter* put in by the plaintiff, giving notice to the respondent within the same time; and the Court doth adjourn the hearing of this appeal until Monday, December 18."

Reading that order, I stated that the dates were fixed in the hope that the time would be sufficient to enable both parties fully to prepare their further evidence, and to enable us to dispose of the case before the Christmas vacation; but that, if further time was required, it would be given. It was most distinctly understood that "*the new matter*" to which our order referred included—in fact, chiefly *was*—evidence on the question of notice. New affidavits were filed, but no further communication was made to us, by way of objection or otherwise, until the case came on again upon January 31, 1906, and we were then surprised to find Mr. Ronan still contending that the question of notice was not open, and that the respondent's further evidence upon it should not be received. We intended, on December 6, to give full opportunity to both sides of presenting all the materials for the consideration of that question, and I had been particularly careful to make it perfectly clear that we did not see how the case could be decided without considering it, and that our object in adjourning

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the appeal was to bring the whole case before us in such a way as to meet the views of Lord Herschell in *The Tasmania* (1) when he said—

> "That a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box."

The second point mentioned by Lord Herschell did not apply here, but the first did, and, as plainly as I could express myself, I explained that the proceedings on December 5 and 6 were directed to bring this case to a hearing in this Court on full notice of all questions to be raised, and of all the evidence to be used in support of each side of the case, so as to enable us to put an end to all controversy upon every point, including the question of notice. This question may or may not have been opened before Barton, J. There was a flat contradiction between counsel on that point. Barton, J., may have based his decision merely upon the applicability of *The Bushmills Case* (2), and if so, perhaps he did not consider the question of notice.

As regards the *onus* of proof, if the substantive action begun by the Bank had been permitted to proceed, the Bank must have sued as purchasers *without notice* and the debenture-holders would have had to plead and prove notice. If the debenture-holders had sued, they must have alleged and proved notice against the Bank. But the vital question of notice must in either case have been raised and decided.

The evidence of notice now given by the debenture-holders shows that the Bank was itself, throughout, a registered debenture-holder, and that it has had many dealings with debentures. It is interested in the winding-up both as a pledgee of whisky, and also as a holder of some of the debentures for which priority is claimed over the pledge. It further appears in evidence that the power

(1) 15 A. C. 225. (2) [1896] 1 I. R. 301, 329.

of pledging whisky in bond was the subject of discussion with the Bank, when it was proposed to issue a second series of debentures.

Both as pledgees and as debenture-holders, the Bank therefore had actual notice of the conflict of priority. What more could we do to secure the fair trial of that conflict? We have not been informed by either party of the precise way in which the Bank's action has been shunted. We do not know whether it has been transferred, or stayed, or dismissed; or if so, how, by whom, or on whose application; therefore, with the concurrence of all parties, this interlocutory proceeding in the present action has been brought here, with all the consequences which Lord Cairns deprecated in *Murray* v. *Bush* (1), differently in form from the way in which the case would have been presented in the other action, but in substance to try the same questions and to decide the same rights.

Concurring with the Lord Chancellor in his decision, I have added these observations—with the concurrence of both my colleagues—for the purpose of putting, on the face of the judgment of this Court, a statement of the manner in which we have dealt with the case, and of showing what we did to prevent surprise, and to give full opportunity to each party to bring forward every material question, and to produce all the available evidence; at the same time preventing additional evidence from being given on appeal in the higgledy-piggledy manner in which it was first presented by the extraordinary affidavit originally filed for the respondent.

HOLMES, L.J.:—

If the action brought by the Hibernian Bank claiming the pledged whisky as against the first and second debenture-holders in the defendant Company had been allowed to proceed, the matters in issue would have been developed in the pleadings, and neither party would have had any excuse for not being prepared to deal with them at the trial. It seems, however, to have been thought that this mode of procedure would have caused unnecessary expense;

(1) L. R. 6 H. L. 37.

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and the result has been that the claim of the Bank came before Mr. Justice Barton in a very unsatisfactory way. The only evidence before him, in addition to the claim and the form of the debentures, were two meagre affidavits. There was, on the one hand, little to show the circumstances that had led to the pledging of the whisky; and on the other, it did not appear that the Bank had notice of the existence and contents of the debentures. It was, therefore, natural that each party would seek to supplement his proof on the point in which it was defective; and, accordingly, notice was served by the Bank, that on the hearing of the present appeal the Court would be asked for leave to adduce further evidence as to the ordinary course of business of the Company. Subsequently the plaintiff served a notice that he would apply to the Court for leave to use on the appeal certain affidavits and documents, without, however, specifying the issue to which they were directed. It is by no means certain that leave to offer further evidence was needed. The point has never, as far as I am aware, been expressly decided; but I am disposed to think that this is technically an appeal from an interlocutory order, in which case further evidence can be given as of right. Both motions were, however, moved; and no objection having been taken to that of the Bank, it was at once granted. The plaintiff's application was vigorously opposed; and during the discussion it was made clear that this opposition did not arise from ignorance of the issue to which the further evidence was to be directed. Counsel for the Bank were aware that its object would be to show that their clients had, at the time of the pledge, notice of the existence and contents of the debentures. In the documents before Mr. Justice Barton there was no reference to such notice. It was neither affirmed by the one side nor denied by the other. Mr. Ronan argued in Judge Barton's Court, and I assume rightly argued, that if the Bank had no notice of the existence of the debentures at the time of the pledge, their security would not have been affected thereby; and, I suppose, he also argued that it must be taken that there was no such notice in the absence of evidence to the contrary. We have no information as to how this argument was dealt with by the plaintiff's counsel; but we are aware that no mention is made of it in Mr. Justice Barton's judgment. In

these circumstances it seemed to us that it would be most unsatisfactory to proceed with the appeal without giving the parties an opportunity of showing what is the actual fact as to this branch of the case; but we were of opinion that the affidavits sought to be used by the plaintiff, referring as they did to a mass of documents without selection or discrimination, were much too vague. Accordingly we adjourned the hearing of the appeal, giving the plaintiff leave to serve an amended notice and new affidavits, and allowing the Bank ample opportunity to reply thereto. An amended notice, indicating with sufficient precision the evidence relied on, was then served; and on the further hearing of the appeal leave to use it was given, notwithstanding the protest of Mr. Ronan, who declined, on behalf of his clients, to answer it. The result is that there is now before the Court clear and uncontradicted proof that the Bank, at the time of the pledge, knew everything that was to be known of the debentures, and had ample opportunity of considering the rights of the debenture-holders. I have dealt with this branch of the case in a little detail, because counsel for the Bank seemed to regard our order to admit the evidence as an improper exercise of jurisdiction. In the circumstances of the case, it seems to me if an order for the purpose was required at all, that it was a matter of course for the Court to make it.

I do not offer a decided opinion as to whether the burden of proving notice was on the plaintiff. I am disposed to think that if a person taking a *puisne* charge relies as a defence to an earlier chargeant upon valuable consideration without notice, he ought to give some evidence of want of notice. At the least he ought to show before the trial that this is his defence. But, whatever may be the technical rule on this point, I am clearly of opinion that this Court would be violating an elementary principle of justice if, in a case like the present, where it appears that uncontradicted evidence of the fact of notice exists, it were to give its decision upon the assumption that there had been no such notice. I leave it to some higher tribunal to take this heroic step.

Having thus disposed of the question of notice, little remains for consideration that has not already been decided by this Court. The defendant Company being authorized to borrow the sum of

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£35,000 on the security of its undertaking by the issue of 350 mortgage debentures of £100 each, bearing interest at the rate of £5 per cent. per annum, proceeded to raise this amount by means of two documents. One of these was a demise of its freehold and leasehold premises to trustees to secure repayment to the lenders *pari passu*. The other was what is described as a debenture, by which the Company charges in favour of each lender of £100 the repayment thereof on its undertaking and all its property both present and future not comprised in the demise aforesaid, subject to certain conditions indorsed thereon.

The material conditions are the third and fourth. The third declares that the charge thereby created "shall be a floating security, and, accordingly, the Company may, in the course of its business, and for the purpose of carrying on the same, deal with the property charged in such manner as the Company may think fit, and in particular may sell, lease, or exchange the same, pay, and receive money, and may declare and pay dividends out of profits." The fourth condition provides that "nothing herein contained shall be taken to authorise the creation of any mortgage or charge on the property for the time being of the Company in priority to the charge hereby created." Debentures similarly secured came before this Court on two occasions: *Re Old Bushmills Distillery Company* (1), when all the authorities up to that date were carefully considered; and it would be waste of time for me to review them again, as I am bound to carry out what was then decided. It is, I think, impossible to distinguish the security in that case from the security in the present. The fourth and fifth conditions in the former correspond with the third and fourth in the latter. I need say no more about the first of these conditions than that, although the transaction with the Bank was neither a sale, lease, nor exchange of the property of the Company, I am prepared to assume that it was a dealing in the course of its business and for the purpose of carrying on the same; and that, therefore, if there was nothing more, the pledge to the Bank would be prior to the rights of the debenture-holders. But there follows the second condition, the object of which was to preserve the priority of the

(1) [1896] 1 I. R. 301, 329.

debenture-holders over any mortgage or charge on the property for the time being of the Company. There are one or two verbal differences in the language of this condition when compared with the corresponding condition in the *Bushmills Case* (1) which are relied on by Mr. Ronan, but which I hold are not material. In the debenture now under consideration what is prohibited is a mortgage or charge on the property for the time being of the Company in priority to the charge hereby created. The condition in the other case was directed against a "mortgage or charge upon the said property or any part thereof—having priority over, or equal rank with, the said charge hereby created." I am of opinion that a prohibition to charge property includes a prohibition to charge any part of it, and that a charge having equal rank with the debentures would be a charge to a certain extent in priority to the debentures. Therefore the difference in the conditions is of no importance.

Mr. Ronan further argued that the *Bushmills Case* (1) did not turn upon the conditions in the debentures, but upon a covenant in the collateral deed of trust that the principal and interest secured by the debentures should have precedence over all moneys which might thereafter be raised by the Company by any means whatsoever. I doubt whether this provision adds anything to what is contained in the fourth condition; but if it does, there is a precisely similar provision in the collateral deed in the present case. By clause 15 thereof the Company covenants that it will pay the principal moneys and interest secured by the debentures, and that same shall be a first charge on the mortgaged premises, and shall take precedence over all moneys which may hereafter be raised by the Company by any means whatsoever. It is impossible to confine the final words to the moneys raised on the security of the demised premises. In language and intention they apply to moneys raised in any way upon the security of the property of the Company for the time being. The result is that the debenture-holders stand in the same position in the two cases. In the *Bushmills Case*, No. 1 (1), it was held that a certain transaction with the Bank of Ireland amounted to a mortgage or

(1) [1896] 1 I. R. 301, 329.

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charge on certain whisky, and that such mortgage or charge was not good as against the debenture-holders.

In the *Bushmills Case*, No. 2 (1), it was held that the transaction being a *bona fide* sale of whisky out-and-out, the debenture-holders had no claim thereon. In the present case it is not even suggested that there was a sale. It is admitted that the whisky was merely pledged as a security; and, following the *Bushmills Case*, No. 1 (2), which is binding on this Court, and with which I may say I entirely agree, I hold that the claim of the Bank cannot be sustained. I may add that I am unable to follow Mr. Ronan's argument that the words "mortgage or charge" do not include a pledge. The effect of the pledge, according to his own contention, was to charge the debt due to the Bank on the whisky. Therefore, if the condition had omitted the word "mortgage" altogether, the pledge would have been prohibited by the term "charge"; and I am unable to see how this is altered by mentioning in the first instance a particular kind of charge. The reasonable explanation is that the draughtsman having used the word "mortgage," remembered that there were other modes of charging property, and, accordingly, determined to embrace them all under the most general description which our language supplies. For these reasons, I am of opinion that the appeal ought to be dismissed.

Solicitor for the plaintiff: *R. Dickie.*
Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*

R. D. M.

(1) [1897] 1 I. R. 488. (2) [1896] 1r I. R. 301, 329.

SMITH *v.* SAVAGE.
(1905. No. 196.)

Barton, J.
1906.
Feb. 20.
May 5.

Statute of Limitations—Intestate—Farm—Next-of-kin in possession—Other next-of-kin out of possession for more than twelve years—Former entitled to shares of latter as joint tenants.

The next-of-kin of an intestate, who remain on in possession of chattels real without taking out administration, acquire, under the Statute of Limitations, a joint tenancy in the shares of other next-of-kin who have remained out of possession for more than twelve years, although, in respect of their own original shares, they hold as tenants in common.

Martin v. *Kearney* (36 Ir. L. T. R. 117) distinguished.

Trial of Action. Patrick M'Mullan, of Legananny, in the County of Down, was, at the time of his death, possessed of four farms of land, which together contained 87A. 0R. 20P., situate in the townland of Legananny, barony of Upper Iveagh, and County of Down, held under a tenancy from year to year. Patrick M'Mullan died on the 2nd October, 1864, intestate, leaving a widow Margaret M'Mullan, two sons, Owen and James, and six daughters, Mary, Catherine, Ellen, Margaret, Teresa (the plaintiff), and Lucy, who thereupon entered into possession of the lands. No representation was taken out to Patrick M'Mullan, and his widow caused her name to be inserted in the landlord's books as tenant of the farms, and in the year 1880 these farms were consolidated into one holding at the yearly rent of £34. Subsequently by agreement the judicial rent of the holding was fixed at £29. The name of Margaret M'Mullan continued in the landlord's books as tenant of the holding to the date of her death, which occurred on the 22nd February, 1892, whereupon Owen M'Mullan caused his name to be inserted in the landlord's books as tenant of the holding, and his name remained in the landlord's books to the date of his death, which occurred on 15th December, 1903. By his will dated 27th November, 1903, Owen M'Mullan bequeathed all his property to James Lewis Savage, Patrick Daniel Savage, and Patrick M'Mullan, whom he appointed his executors.

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By an order of the Land Commission, dated 22nd November, 1904, the judicial rent of the holding was fixed in the joint names of Patrick Daniel Savage and Patrick M'Mullan, who had taken out probate, the other executor having renounced.

Mary M'Mullan, one of the aforesaid children of Patrick M'Mullan, married Daniel Murray on the 24th April, 1868, and ceased to reside on the holding. Margaret M'Mullan, another of the children of Patrick M'Mullan, married Edward O'Hare on or about the 24th day of October, 1871, from which date she ceased to reside on the holding. Catherine M'Mullan, another child of Patrick M'Mullan, married Bernard Smith on 25th August, 1874, and thenceforward ceased to reside on the holding. Ellen M'Mullan, another child of Patrick M'Mullan, married Daniel Kearney on June 12, 1890, and from that time on ceased to reside on the holding.

James M'Mullan and Lucy M'Mullan continued to reside on the holding to the date of their deaths, which occurred on the 5th April, 1896, and on the 3rd of February, 1904, respectively. The plaintiff, Teresa Smith, continued to reside on the holding from the date of the death of her father, Patrick M'Mullan, and was residing there at the date of these proceedings.

The plaintiff's case was that, in the events which had happened, the four undivided twelfths which Mary M'Mullan, Margaret M'Mullan, Catherine M'Mullan, and Ellen M'Mullan, had acquired as next-of-kin of Patrick M'Mullan, had become vested in Owen M'Mullan, James M'Mullan, Lucy M'Mullan, and the plaintiff, as joint tenants, and not as tenants in common, and that the plaintiff, as sole survivor of these joint tenants, was absolutely entitled to same.

S. L. Brown, K.C., and *W. M. Whittaker*, for the plaintiffs :—

The tenancy acquired under the Statute of Limitations by the next-of-kin, who remain in possession for more than twelve years, in the shares of other next-of-kin in lands who have remained out of possession for that period is a joint tenancy : *Ward* v. *Ward* (1) and *Bolling* v. *Hobday* (2) establish this proposition.

(1) L. R. 6 Ch. 789. (2) 31 W. R. 9.

Barton, J. 1906.

SMITH v. SAVAGE.

Drumgoole (with him *Serjeant Dodd*), for the defendant:—

The next-of-kin who remained on in possession acquired the shares of those who had lost these shares by remaining out of possession during the statutory period as accretions to their original shares, and, therefore, hold the whole as tenants in common. The case is governed by *Martin* v. *Kearney* (1), although this precise point was not argued in that case. If the law were as contended for by the plaintiff, the farm in the case would have been divided into fifths, not fourths, and the survivor of the four children who remained in possession would have been entitled to the share of the child, who went out of possession in addition to his own original fifth.

May 5.

BARTON, J.:—

I postponed judgment for the purpose of making inquiries in the proper quarter, as a result of which I have ascertained that the question which arises in the present case was not argued by counsel, or considered by the Court in the case of *Martin* v. *Kearney* (1). *Martin* v. *Kearney* (1) decided that next-of-kin, who remain in possession of chattel real property of a deceased intestate without administration being taken out, do so not as trespassers under a wrongful title, but as equitable tenants in common; and that, when the Statute of Limitations runs in their favour, they acquire a title as legal tenants in common. In the present case a different question arises. After the death of the intestate, some of the next-of-kin left the farm and remained out of possession for more than the statutory period of twelve years. It is conceded that those who remained in possession acquired a title under the Statute of Limitations to the shares of the absent ones. Did they acquire title to those shares as tenants in common or as joint tenants? That is the question for decision.

In my opinion, the next-of-kin who remained in possession continued to be tenants in common as to their original shares, but acquired title to the shares of the absent ones as joint tenants. Section 12 of the Real Property Limitation Act, 1833, abolished, for the purpose of the Statute of Limitations, the old doctrine that

(1) 36 Ir. L. T. R. 117.

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the possession of one tenant in common is the possession of all. That section has the effect of making the possession by those next-of-kin, who remain in occupation of the share of an absent one, separate and adverse in respect of such shares. Accordingly, we have, in such a case, some of the next-of-kin taking, at the same moment of time, and by one common wrongful title, wrongful possession of the share of the absent one, and continuing in such possession for the statutory period. All the requisites of a joint tenancy seem to be present. The case of *Ward* v. *Ward* (1), although not identical in its facts, seems in principle to be indistinguishable. That was a decision of the Court of Appeal in England in which Lord Selborne delivered the judgment of the Court. At page 792 Lord Selborne referred to an analogous case. He said: "The case is very analogous to that of one of three tenants in common, conveying his share to the other two without words of severance. They are joint tenants of the share so conveyed, though they remain tenants in common as to their original shares."

Accordingly, I hold that the next-of-kin who remained in possession acquired the shares of the absent ones as joint tenants, although they continued to be tenants in common in respect of their original shares.

I may add, that I am under the impression that too much has been made of an *argumentum ab inconvenienti*. I find no difficulty in the present case in working out the rights of the parties upon the lines of this decision.

Solicitor for the plaintiffs: *Wallace.*

Solicitors for the defendants: *Bell & M'Cartan.*

J. MAC M.

(1) L. R. 6 Ch. 789.

THE ATTORNEY-GENERAL (CAHILL) *v.* ALLMAN, SCANLAN AND WALSH (1).

Appeal.
1906.
April 9.

Practice—Costs—Relator—No visible means.

Where an action is brought by a relator, at the suit of the Attorney-General, to have a public trust carried out, or a charitable scheme settled, and where it appears that the defendants have a defence to the action, or that there is some question to be tried, the Court will order the relator, if without visible means, to give security for costs.

ACTION by the plaintiff for a declaration that the defendants are trustees of a sum of £1500, or of the moneys and other property representing the same, for the purpose of providing a public park or recreation ground for the people of Bandon; for an account of the dealings of the defendants with the fund; and to have the trusts carried into execution.

Prior to the month of May, 1896, Sir John Arnott had purchased the Bandon estate of the Duke of Devonshire. On the 6th May, 1896, there was a public reception in the Town Hall of Bandon, for the presentation of an address to Sir John Arnott, and on that occasion Lady Arnott presented a cheque for £1500 from Sir John Arnott, payable to the three defendants. The trusts upon which the £1500 was to be held were to provide a town park, or recreation ground, and a horse fair field for the accommodation of the townspeople of Bandon.

In 1898 and 1899, the defendants purchased a piece of land held in fee-simple, containing about 18 acres on the north side of the town of Bandon, from two landlords, Mr. F. J. Munns, and the trustees of the Arnott estate. The purchase money amounted to £909, and in addition the defendants paid as compensation to the occupying tenants and graziers upon the lands £465, the said two sums making together £1374. Since the purchase, the defendants had annually let the grazing of the land, subject to the right

(1) Before WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1906.

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of holding two free horse fairs thereon yearly, pending the laying out of the ground and completing it for the purposes of a town park. The two horse fairs had been held annually, and the defendants had obtained from an engineer a plan for laying out the grounds, but as this would involve an expenditure of £500, the defendants had been unable to carry it out for want of funds. The defendants had standing to their credit a sum of £139 8*s.* 10*d.*, which represented the balance after the payments mentioned, and other expenditure incurred in connexion with the undertaking, amounting to the sum of £1586 1*s.* 2*d.* The defendants had kept accounts of the said moneys and the expenditure, and these accounts were, they said, always open to inspection. The relator was a labourer in the employment of the Town Commissioners of Bandon, at 12*s.* a week, and he lived in a small cottage in the town, at a small rent; he had no visible means. For eight or nine years the defendants had taken a recreation ground near the town, to which the public had access at all times, for sports and amusement. This ground was rented at £10 a year, and the rent was paid out of the proceeds of the grazing money received out of the trust property.

In February, 1906, resolutions had been passed by the Irish Land and Labour Association, demanding that the land purchased by the defendants should be dedicated to the public and thrown open as a public park, and that the defendants should spend the balance in their hands in completing the town park.

The relator, in his affidavit, stated that the land which the defendants had purchased was let to graziers at £30 a year to the exclusion of the towns-people; that the field which the defendants had rented at £10 a-year was flooded for some months in the year, and was consequently useless as a recreation ground; and that if the towns-people were obliged to wait until the defendants collected £500 out of the grazing rents it would take about twenty years more to get the money, and during all that time the towns-people would be deprived of the benefit of the trust.

The defendants moved for an order that the relator should give security for costs, and on the 13th March, 1906, Sir Andrew Marshall Porter, M.R., granted the motion. See 40 Ir. L. T. R. 94.

The relator appealed.

Charles Doyle, K.C., and *Linehan*, for the appellant:—

Unless the defendants can satisfy the Court that there is reasonable ground for concluding that the action will be dismissed, we ought not to be made to give security for costs. The towns-people are getting no benefit out of this trust fund; and will not get any benefit for years to come. The relator is directly interested in the trust. The case relied upon by the defendants was *The Attorney-General* v. *Roche* (1); but there the relator had filed a petition for arrangement. There is no case in which an interested poor relator as distinguished from an insolvent has been ordered to give security for costs: *Rex* (*Crane*) v. *Sir W. Wynne* (2); *Attorney-General* v. *Knight* (3).

Conner, K.C., and *P. Lynch*, for the defendants:—

The object of having a relator was to have some one to answer for costs: Dan. Ch. Pr., p. 60; Mitford's Equity Pleading, p. 24; *Tredwell* v. *Byrch* (4).

WALKER, C.:—

In this case we have heard the arguments at length, and we are all of opinion that the order of the Master of the Rolls should be affirmed. When the case was before him, he came to the conclusion that the defendants had a reasonable ground for defending the action, and to have it tried out; and I cannot say that he was wrong in arriving at that conclusion. If it appeared clearly on the affidavits that there was no defence, or gross default of the trustees in holding trust money, it might be a different case; but we cannot come to that conclusion. The question is whether, according to the practice of the Court, the relator ought to give security for costs. There are two ways in which an action of this kind can be prosecuted—one is by the Attorney-General taking up the case, as in the case of a charity, and proceeding on information at his own suit to have the trust carried out, and a scheme settled; but that is done at the expense of the charity, and it imposes a great hardship on that charity, and upon the defendants who are

(1) I. R. 11 Eq. 251.
(2) 2 M. & S. 346.
(3) 3 M. & Cr. 154.
(4) 1 Y. & C. Ex. 476.

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made parties. The other is to furnish the name of a relator for the purpose, to whom the Attorney-General entrusts the conduct of the suit, and *prima facie* he should be a person responsible for the costs of the proceeding, when he is so entrusted. That was the practice since Lord Redesdale's time, as he states in Mitford's Equity Pleading. In Daniell's Chancery Practice (7th ed.), p. 60, the rule is stated :—"As the principal object in having a relator is that he may be answerable for the costs of the proceedings, in case the action shall appear to have been improperly instituted or conducted, it follows, as a matter of course, that such relator must be a person of substance, and if it is made to appear to the Court that the relator is not a responsible person, all further proceedings in the information will be stayed, till a proper person shall be named as relator." Here a person was named, but it appears that he is not a person from his position and means really responsible for costs. That being so, the Master of the Rolls came to the conclusion that the relator should give security for costs. In my opinion that order was right. I have no doubt that, when a sum is named for security for costs, this Land and Labour Association will be able to give security, if they are anxious that the case should be proceeded with.

FITZ GIBBON, L.J., concurred.

HOLMES, L.J. :—

I wish to state what the effect of our decision is. It does not follow from the present decision that in an action of this character, where a kind of semi-public trust is sought to be carried into effect, a defendant can always oblige a relator to give security for costs. The foundation of the principle of ordering security for costs is that there must be a defence to the action or some question to be tried in the action; and I can understand that, in a case where there must be a judgment of some kind against the defendants, security for costs would not be ordered. In this case, if nothing had been done with the money since 1896, if the money had been left in the bank, I entertain grave doubt if the Master of the Rolls would have made the order. But where there is a question to be tried, it is necessary that the plaintiff should prove to the satisfac-

tion of the Court that he is a person who can reasonably be trusted with the prosecution of the case; and if the action is brought improperly, so that it may injure the defendants, or the charity, there ought to be some security for the costs of suit.

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Solicitor for the relator: *P. J. M'Carthy.*
Solicitor for the defendants: *G. K. Sherlock.*

R. D. M.

IN RE THE POSTMASTER-GENERAL AND COLGAN'S CONTRACT.

Appeal. 1906. May 2, 3.

Vendor and purchaser—Contract for sale of freehold premises—Vacant possession—Non-completion on appointed day—Interest on purchase-money—Wilful default of vendors.

THE facts of the case are reported *ante*, p. 287. The vendors appealed.

Matheson, K.C., and *M'Ilroy*, for the appellants.

Samuels, K.C., and *The Hon. Cecil Atkinson*, for the Postmaster-General.

THE COURT (Walker, C., and FitzGibbon and Holmes, L.JJ.) dismissed the appeal with costs, without calling on counsel for the respondent.

Solicitor for the appellants: *Louis A. Meenan.*
Solicitor for the respondent: *E. R. Bate.*

R. D. M.

M. R. 1905. Dec. 4, 11, 20. 1906. Jan. 26.

In re MONTGOMERY STREET AREA IMPROVEMENT SCHEME and PILKINGTON.

Conveyance—Solicitor—Remuneration—Costs of comparison of engrossment with draft—"Deed or instrument"—Schedule of Fees of 1859—19 & 20 *Vict. c.* 92.

The solicitor of a grantor is entitled to be allowed his costs of comparing the engrossment of grant and memorial with draft conveyance, as being a charge within item 141 in the Schedule of Fees of 1859, "for perusing or comparing any deed or instrument, when necessary."

Application, by Mrs. C. E. Pilkington, to review taxation in respect of certain items in a bill of costs for comparing the engrossments of conveyances to the Corporation of the city of Dublin, with the drafts as furnished by the solicitor for the Corporation, and approved of by the applicant's solicitor.

The Taxing Master, in his report, certified as follows:—"(4) The objector claims by her objection that the items in question are covered by item 141 in the schedule of fees of the 3rd of January, 1859 . . . (5) In my opinion, and in the opinion of my colleagues with whom I have consulted hereon, item 141 is wholly inapplicable to the claims here made. It seems to me that the expression 'deed or instrument' therein contained relates solely to documents which have been already executed, and not to deeds or instruments which are in course of preparation and completion. The claim for comparing the engrossment or the copy of a document would appear to be a novelty, and I am not aware of any authority for its allowance. If I may offer a suggestion on the subject, I would be disposed to say that the allowance of 1*s.* a folio for perusing the draft instrument, and the attendances or letters (as the case may be) in relation to the execution of same, form the prescribed remuneration for the business referred to. (6) As to the claim now made in the objection for a *quantum meruit*, I confess I do not see its reasonableness. I have, I consider, taxed the costs liberally, and I do not think I am called upon, and

perhaps I have no authority, to increase the remuneration I have awarded. (7) Under the circumstances I overrule the objections."

The other circumstances of the case are fully set out in the judgment.

Matheson, K.C., in support of the application.

Philip White, for the Corporation of Dublin.

THE MASTER OF THE ROLLS:—

Dec. 20.

The question arises as regards several fees which are really cumulative.

Item 92 is a charge for "comparing and examining engrossment and memorial with draft, 5 skins, 12*s.* 6*d.*" This was objected to, and the Taxing Master disallowed it on the ground that the deed was not actually executed at the time, and so does not come within the scale of schedule fees (item 141) "for perusing or comparing any deed or instrument when necessary, or reading deeds at client's desire when no case is required, for each skin or fractional part, 2*s.* 6*d.*"

Technically, perhaps, there is something to be said in support of this view; but I think that when a deed has been regularly prepared for execution it may be treated as a deed within the schedule. When the matter came on before me, I asked the Taxing Master to certify two things, first—whether he considered the comparison of the engrossment with the draft was an important part of the solicitor's duty, and it is obvious that the most important part of his duty is in reference to the draft itself; but comparing it with the engrossment must be treated as being a very important matter, because by accident a whole sentence might be put out of the engrossment, and even a word left out or miscopied might change the whole of the meaning. The most important purpose of the comparison is that the engrossment should actually correspond with the draft, and I, therefore, asked the Taxing Master whether it was an essential part of the solicitor's duty; and, secondly, if he did so consider it, I asked him to say whether it was actually covered by any and what fees in the schedule. He says:—"I think the services in question do form a necessary part of the duty

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of a solicitor, and that such services are remunerated, as to item 92, by the allowances of £1 10*s.*, at items 93, 94, and 95; as to item 165 by the allowances of £1, at items 168 and 169; and as to items 192 and 193, by the allowances of £2 in respect of items 194, 195, and 196; and that as to all such services, they are also remunerated by the allowance of £2 at item 80, 8*s.* at item 103, 18*s.* at item 161, £1 1*s.* at item 181, 6*s.* 8*d.* at item 187, and 6*s.* 8*d.* at item 189. There is no fee (*per se*), so far as I am aware, allowable for comparing or examining the engrossment or copy of an unexecuted deed or instrument with the draft, and I think that the services therefor are covered by the allowances above-mentioned —that is to say, by the charges for perusing the draft-deeds, and for attendances when the deeds are executed; and subject thereto that such services should be rendered gratuitously by reason of the aggregate of the other charges in the bill of costs as taxed." The question then is—first, whether the allowance of 10*s.* each for attendance covers the comparing of the engrossment and the draft. I think the 10*s.* in terms does not cover anything but the attendance to see the document, which has been engrossed, properly executed. It is obvious it must have reference to the execution and not to the comparison. Item 80, in the bill of costs, is for "Perusing and approving of draft assignment, 40 folios at 1*s.*, £2." That cannot, in my opinion, cover the work done in comparing the engrossment with the draft. As to the attendances on the execution of deeds—If several different persons, at different times, executed documents, there would be a charge of 10*s.* for each attendance, and the charge is clearly for seeing the execution, and not for the perusal of the document. That charge has nothing to do with the comparison of the draft with the engrossment. The statement in the report that other charges in the bill of costs have been liberally taxed, does not affect the question, because every item, except in the case of a scale-fee, is paid for separately, and it is no answer to this claim to say that the solicitor may have been overpaid in other parts of the bill. I must assume that the costs have been properly taxed in respect of the other charges, and, at any rate, if it be a necessary part of a solicitor's duty to compare the draft with the engrossment, it is no answer to say that, as a matter of fact, he has been overpaid for doing something different.

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I, therefore, think the case is one in which the solicitor is entitled to some remuneration for comparing and examining the engrossment and the draft. The engrossment is the deed itself, and I think 12*s.* 6*d.* should be allowed as being a fee which is properly chargeable, and Taxing Masters will, in future, be strict to see that the proper fee is charged for each and every item.

This fee, in my opinion, is properly chargeable. Suppose it is not so, and this duty was not done, and the solicitor allowed the client to see to the execution. If the deed was improperly compared and a mistake occurred, it would be negligence on his part; and if there were negligence on his part, he would have no defence to an action of negligence in respect of services for which he has received no remuneration.

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On a subsequent day the case was re-listed, and *Mr. White* referred to *Lowry & Mullan* v. *Brooks* (1) as showing that the point arising in this case had been already decided by Andrews, J. The Master of the Rolls said that the question before him did not appear to have been considered by Andrews, J. If he thought the point had been discussed and determined by him, he would not have been justified in differing from him. He said he did not think he should alter his decision on the matter.

Solicitors for the applicant: *William C. Hogan & Sons.*
Solicitor for the Corporation of Dublin: *Ignatius Rice.*

R. W. L.

(1) [1902] 2 I. R. 397.

L. C.
1906.

O'DONOGHUE *v.* O'DONOGHUE.

April 14, 21. *Settlement—Construction—Trust for husband for his life, or till bankruptcy, or till execution—Limitation over on the happening of any such events.*

By settlement, dated the 15th August, 1890, executed subsequently to the marriage of E. O. and M. O., in pursuance of marriage articles prior to the said marriage, in consideration of £400 paid by the said M. O., the wife, to E. O., the husband, freehold property of the wife, and chattels real, and chattel property of the husband, were vested in trustees, upon trust for E. O. during his natural life, or until he should become bankrupt or unable to meet his engagements, or until he should do or suffer any act whereby the whole or any part of the premises should be seized, sold, or taken in execution, upon the happening of any of which such events the trustees should hold the premises upon trust to immediately raise thereout £750, to be paid to the said M. O., should she be then living, or, should she be then dead, to the child or children of the marriage then living in equal shares; and the sum of £750 was thereby charged on all the said premises; and, subject to the said charge, to hold all the said premises for the said E. O., his heirs, executors, administrators, and assigns. There was issue of the marriage four children. E. O. died in 1898 intestate:—

Held, that M. O. was entitled, on the death of her husband, to have the sum of £750 raised for her benefit.

Summons by Mary O'Donoghue for a declaration—That on the true construction of the settlement dated the 15th August, 1890, made between Edward O'Donoghue of the first part, Mary O'Donoghue of the second part, and Thomas Meagher and Edward Burke of the third part, the sum of £750 mentioned in the said settlement became raisable and payable on the death of Edward O'Donoghue to the plaintiff, Mary O'Donoghue, and that the said sum was well charged upon the premises in the said settlement mentioned.

By an agreement dated the 1st of July, 1890, made between Edward O'Donoghue of the one part, and Mary Hamilton of the other part (being an agreement made prior to the marriage of the said parties), it was agreed, in consideration of the marriage and of a sum of £400 paid by the said Mary Hamilton to the said

Edward O'Donoghue, that the said Mary Hamilton should grant to the trustees of a settlement to be thereafter executed all her estate and interest in the town-parks of Roscrea, in the county of Tipperary, on the trusts thereinafter-mentioned, and that Edward O'Donoghue should assign to the said trustees his estate and interest in a dwelling-house and licensed premises in Dublin-street, Clonmel, and in the stock and chattels therein, and also his interest in a house, No. 31, Parnell-street, Clonmel, and the goods and chattels therein. The trusts declared were in trust for Edward O'Donoghue for life, or until he should become bankrupt or unable to meet his engagements, or until he should do or suffer any act whereby the whole or any part of the premises, goods, or chattels should be liable to be taken in execution, upon the happening of any of which events they should hold the said premises upon trust to raise thereout the sum of £750 for the said Mary Hamilton, should she be then living, but should she be then dead, for the child or children of the intended marriage then living in equal shares, and said sum of £750 should be charged upon all the said premises, goods, and chattels. The parties agreed, within a reasonable time after the marriage, to execute a settlement in pursuance of this agreement.

The said Edward O'Donoghue and Mary Hamilton were married on the 2nd July, 1890.

By indenture dated the 15th August, 1890, made between Edward O'Donoghue of the first part, Mary O'Donoghue of the second part, and Thomas F. Meagher and Edward Burke of the third part, after reciting the marriage articles, in consideration of the marriage, and of the sum of £400 paid by Mary O'Donoghue to Edward O'Donoghue, the said Mary O'Donoghue conveyed to the trustees part of the town-parks of Roscrea, and Edward O'Donoghue assigned to the trustees the licensed house and premises, No. 2, Dublin-street, Clonmel, and also the shop and premises, 31, Parnell-street Clonmel, and the stock-in-trade, goods, and chattels therein, upon trust for Edward O'Donoghue, "during his natural life or until he shall become bankrupt, insolvent, or unable to meet his engagements, or until such time as he shall do, or suffer to be done, any act whereby the whole or any part of the said premises, stock, goods, or chattels,

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shall be liable to be seized, sold, or taken in execution under any writ, process or judgment, upon the happening of any of which such events" the trustees should hold the premises upon trust to immediately raise thereout the sum of £750 to be paid to the said Mary O'Donoghue, should she be then living, or should she be then dead to the child or children of the said marriage as should be then living in equal shares or proportions. And the said sum of £750 was thereby charged on all the said premises, and, subject to the said charge, the trustees were to hold all the said premises, goods, and chattels in trust for the said Edward O'Donoghue, his heirs, executors, administrators, and assigns.

There was issue of the marriage four children. The said Edward O'Donoghue died intestate on the 21st April, 1898. The children, being minors, were made wards of Court, and in the schedule to the petition it was stated that they were entitled in equal shares to two-thirds of the personal estate of their father on his death intestate, and that the minor Charles O'Donoghue was entitled as his father's heir-at-law to the town-parks of Roscrea, which were fee-simple. The order on the petition was made on the 2nd December, 1900, and Mrs. O'Donoghue issued a summons to obtain a decision on the construction of the marriage settlement.

Molony, K.C., on behalf of the widow:—

It is a necessary implication that the charge should take effect on the determination in any manner of the preceding estate, and is not contingent on its determination in a particular manner only; otherwise the use of the words annexed to the gift to the husband limiting the gift to his life would be inoperative, and the vesting of the charge was clearly postponed only for the benefit of the husband: *Underhill* v. *Roden* (1); *Re Akeroyd* (2). *Stanford* v. *Stanford* (3) is the converse of this; *Blackwell* v. *Bull* (4).

Mountifort G. Longfield, for the defendants:—

The settlement enumerates the events in which the charge in favour of the plaintiff was to become effective. The death of her

(1) 2 Ch. D. 494.
(2) [1893] 3 Ch. 363.
(3) 34 Ch. D. 362.
(4) 1 Keen, 176.

husband is not one of them; for the words "at his death" cannot be substituted for "during his life" to supply a further event. There is no ambiguity and, therefore, this case is governed by *In re Tredwell* (1) and not by *In re Akeroyd* (2).

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The reasonable construction of the deed is that the husband should have an absolute power of disposition over all the trust property if none of the specified events happened.

WALKER, C.:—

April 21.

I have considered this question, which arises upon the construction of the marriage articles of 1st July, 1890, and the settlement executed in pursuance of same on the 15th August, 1890. I do not think much turns upon the fact of there being articles, for the same difficulty arises on their construction as upon the settlement. The wife had a fortune of £400, and she had also some house property held in fee-simple. The husband was possessed of a licensed house in Clonmel, and another house there, and stock-in-trade and furniture, and of this common property trusts are declared in consideration of the marriage, and of £400, the wife's fortune, paid to the husband. The trusts, as expressed in the settlement, are—[His Lordship read the clause, *ante*, pp. 483, 484].

The husband died without having become bankrupt or insolvent, and the question is whether the £750 becomes raisable on his death.

Mr. Longfield contended that the words "upon the happening of any of which such events" did not extend to or include the death of the husband, and that the £750 was not raisable. I am of opinion that Mr. Molony's contention is correct, and that the £750 is raisable for the wife's benefit.

The object of every marriage settlement is to make a provision for the wife and issue of the marriage, and if the wife had died in the life of the husband, and the husband had then died leaving children, the £750 could not, according to Mr. Longfield's contention, have been raised for the children. The paramount intention was, I think, to make this provision for the wife and children, and subject to that to give all the house property to the husband. If

(1) [1891] 2 Ch. 641. (2) [1893] 3 Ch. 363.

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Mr. Longfield's contention were correct, the words "during his natural life" would be superfluous, inasmuch as there is an express trust for the husband absolutely subject to the charge; but I think the words "during his natural life" strongly support Mr. Molony's argument. The husband gets an estate for his life—a limited estate—and the next clauses are introduced by the word "or," showing that something was to happen on the expiration of his life, as well as on the events subsequently specifically enumerated, so that the words "during his life" "or," with the words that follow it, introduce a group of events. This is fortified by the clause giving all the property to the husband absolutely, "subject to said charge."

The case is really not one on which authority can throw much light; but the case of *Re Akeroyd's Settlement* (1) is of value, as it shows that the Court will so construe the language as to carry out a paramount and reasonable intention in a settlement. It was a case somewhat the converse of the present. I had in my mind also cases in which an implication had been made of a life estate to a wife or husband upon the construction of the settlement as a whole. I have since found them. They are *Tunstall* v. *Trappes* (2) and *Allin* v. *Crawshay* (3).

Upon the whole I entertain a reasonably clear opinion that the £750 is raisable, and I so answer the question. Both parties are entitled to their costs.

Solicitor for the plaintiff: *D. J. Higgins.*

Solicitor for the defendant: *Sir Augustine Baker.*

R. D. M.

(1) [1893] 3 Ch. 363. (2) 3 Sim. 312. (3) 9 Hare, 382.

O'LOUGHLIN *v.* BELLEW.

L. C.
1906.
April 14, 21.

Will—Children—Illegitimate children—Gift to grandchildren—Reputation.

By her will, dated the 11th May, 1901, testatrix bequeathed to her daughter two houses in Dublin for her life for her separate use, so that she should not have power while under coverture to dispose of the same, and after her death to such of her children as the daughter should appoint, and, subject to any such appointment, to all her children in equal shares. She bequeathed another house in Dublin to C. for life, and after her death to her said daughter for her life, subject to the same powers and limitations as the other two houses, and after the death of the said daughter to her children. She left the residue of her property to her said daughter. The daughter had children by concubinage—admitted, for the purposes of the case, to be illegitimate—all of whom were under the age of twenty-one. Their mother (testatrix's daughter), with these children, resided in a small house close to the residence of the testatrix, and they frequently took their meals and spent most of the day with her. There was evidence to show that the testatrix treated the children as her grandchildren. The testatrix died on the 30th June, 1901, and her daughter died on the 2nd March, 1902:—

Held, that, having regard to the surrounding circumstances, there was a sufficient indication of intention to show that the testatrix used the word "children" as including illegitimate children.

Margaret Prosser, formerly Bellew, by her will, dated the 11th May, 1901, appointed W. J. Murphy and her daughter Mary Elizabeth executor and executrix respectively and trustees. The will then proceeded—"I devise and bequeath to my said daughter Mary Elizabeth O'Loughlin all my estate and interest in the houses 15 and 16 Wentworth-place, Dublin, for her life for her own separate use, and so that she shall not have power while under coverture to dispose of in the way of anticipation, and after her death to all and such one or more of her issue, and in such manner and form in every respect as the said Mary Elizabeth O'Loughlin shall by deed or will or codicil appoint, and in default of and subject to any such appointment to all her children or any child who being sons or a son shall attain the age of twenty-one, or being daughters or a daughter shall attain that

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age or marry, and if more than one in equal shares as tenants in common. I devise and bequeath my house, No. 1, Hogan's-avenue, to my granddaughter Mary Catherine Bellew absolutely, and my house, No. 2, Hogan's-avenue, to Mrs. Kate Conway for her life, and after her death to my daughter the said Mary Elizabeth O'Loughlin for her life, subject to the same powers and limitations as the devise (hereinbefore contained) of the houses in Wentworth-place, and after the death of the said Mary Elizabeth O'Loughlin, to her children or child as she shall appoint in manner hereinbefore expressed, and in default of appointment to her children equally as tenants in common, and if there be only one child to such one child."

The testatrix bequeathed several money legacies, and among them a legacy of £200 "to my said daughter Mary Elizabeth O'Loughlin," and the testatrix left the residue of her property to "her said daughter Mary Elizabeth O'Loughlin."

The testatrix died on the 30th June, 1901, and administration with the will annexed was granted to Mrs. O'Loughlin.

It appeared that the said Mary Elizabeth lived for a number of years with a man named Michael O'Loughlin without having been married to him. There were five children born, Bedelia, Christina, Kathleen, John Charles, and Michael, all of whom were minors. Michael had since died. Three of these children were baptized in the Roman Catholic chapel in Westland-row, Dublin, and in the baptismal certificates they were described as the children "of Michael and Mary Elizabeth Bellew." Evidence was given by two witnesses named Mary Bellew and James Carroll, to the effect that they were well acquainted with Mrs. Prosser and her daughter Mrs. O'Loughlin for years; that Mrs. Prosser had lived at 15, Wentworth-place, Dublin, and Mrs. O'Loughlin and her children lived in a small house, known as No. 2, Hogan's-avenue, belonging to Mrs. Prosser, situate at the rear of the house 15, Wentworth-place. They spent the entire day with Mrs. Prosser in her house at 15, Wentworth-place, took all their meals with her, and merely returned to the other house at night. The O'Loughlin children were always treated by Mrs. Prosser as her grandchildren.

Mary Elizabeth O'Loughlin died on the 2nd March, 1902;

the youngest child Michael, who was born since the death of the testatrix, had since died.

This was a summons by Bridget, Christina, Kathleen, and John Charles O'Loughlin, by James Carroll, their guardian and next friend, for the determination of the question—Whether upon the true construction of the will of Margaret Prosser, and on the assumption that the plaintiffs are not legitimate, the plaintiffs are entitled to the rents and profits of the houses known as 15 and 16, Wentworth-place, and 2, Hogan's-avenue, Dublin, or if not, who is entitled to the interest of Margaret Prosser therein?

Molony, K.C., for the plaintiffs:—

It is competent for the Court in construing this will to have regard to the surrounding circumstances: *Grange* v. *Sturdy* (1). These children were brought up and treated by the grandmother as her grandchildren; and when she uses the words "issue" and "children" in the will, she is not referring to the possible children of a future marriage, but to the children who were practically living with her at the time. This is further shown by the description of her daughter as Mary Elizabeth O'Loughlin, a name she would not bear if she was not regarded by the testatrix as a married woman.

The tendency of modern decisions is, as stated by Kekewich, J., in *Parker* v. *Osborne* (2), in favour of the admission of those born out of wedlock. *Hill* v. *Crook* (3) is strongly in the plaintiffs' favour, and also the cases of *Eagleton* v. *Horner* (4), *Mansell* v. *Allen* (5), and *Loveland* v. *Loveland* (6).

F. N. Greer, for the defendants:—

"Children" *prima facie* means legitimate children, as if so described: *Hill* v. *Crook* (3). There are two classes of cases where their meaning is extended—(1) Where the bequest is to children of a person who was dead at the date of the will, leaving only illegitimate children; (2) where upon the true interpretation of

(1) 31 Ch. D. 511.
(2) [1897] 2 Ch. 208.
(3) L. R. 6 H. L. 265.
(4) 37 Ch. D. 695.
(5) [1901] 2 Ch. 441.
(6) [1906] 1 Ch. 542.

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the will there is an expression of intention by the testator to include illegitimate children. This case does not come within either of these classes. The intention of the testatrix might be to provide for any legitimate children her daughter might have: *Dorin* v. *Dorin* (1). The daughter might have subsequently married, and had children. If it could be shown that the testatrix knew that these children were illegitimate, and that Mrs. O'Loughlin was not married, the case might come within the decision of *Re Horner* (2); but no such evidence was given. To the same effect are the decisions in *Holt* v. *Sindrey* (3) and *Savage* v. *Robertson* (4).

April 21.

Walker, C.:—

The question raised on this summons is whether illegitimate children of Mary Elizabeth, the daughter of Margaret Prosser, can take the gift contained in the will of that Margaret Prosser, under the terms of that will, aided by the surrounding circumstances. I was pressed by both parties to decide this question on the assumption that the children were illegitimate, which has never been yet ascertained in a manner which would bind minors; and it was only on the earnest request of both I consented to do so.

The facts are—Margaret Prosser, who had been Bellew, had a daughter, Mary Elizabeth Bellew, who, on the assumption, lived with Michael O'Loughlin, though not lawfully married to him, and had by him, on the 11th May, 1901, when the will was made, four living children, Bedelia, Christina, Kathleen, and John Charles. Margaret Prosser died on the 30th June, 1901, and the will was proved on the 30th August. After the making of the will, and also after the death of Margaret Prosser, there was another child, Michael, born, who died shortly after. Mary Elizabeth O'Loughlin herself died on the 2nd March, 1902. The baptismal certificates of the children from the Westland-row church were produced, and in those the children are described as "of Michael and Mary Elizabeth Bellew."

The four children, and their mother, Mary Elizabeth, lived prac-

(1) L. R. 7 H. L. 568.
(2) 37 Ch. D. 695.
(3) L. R. 7 Eq. 170.
(4) *Ibid.* 176.

tically in the house of Margaret Prosser, 15 Wentworth-place, and the children were treated by her as her grandchildren, and, I think, the evidence shows they had acquired the reputation of being grandchildren. Under those circumstances she made her will on the 11th May, 1901. [The Lord Chancellor read the will.]

In the present case no question arises as to whether the child born after the date of the will is excluded, while the others are included, because Michael died young. It is true that the fact of there being a child born after shows the testatrix could not have considered her daughter as past child-bearing, or incapable of being lawfully married, and having lawful children; but in the present case there is no conflict between the rights of legitimate and illegitimate children, *inter se*, as there was in some of the cases. An examination of the cases cited leads me to the opinion that in the more recent ones the conclusion has been more readily arrived at to let in illegitimate children under a gift to children, which, of course, *prima facie*, means legitimate children only, where the surrounding circumstances show that such was really, as a fact, the intention of the testator, provided always that there is upon the face of the will itself an intention to be fairly deduced from the language used that "children" was used in a meaning which would apply to, and include, illegitimate children. The test adopted by Lord Cairns in *Hill* v. *Crook* (1) is the one to be applied—"Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and include, illegitimate children." The case of *Dorin* v. *Dorin* (2) is quite distinguishable having regard to its facts. I think the point to be looked to in the present case is whether Margaret Prosser has, upon the face of the will, treated Mary Elizabeth O'Loughlin as a wife; and if she has, it follows that her "children" must be intended to mean the children of that wife as such to be included in the class she designates as children.

(1) L. R. 6 H. L. at p. 283. (2) L. R. 7 H. L. 568.

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In the first part of the will she uses the word "issue," but that is explained afterwards to mean children. The decision of Stirling, J., in the case of *Re Horner* (1) rests upon that principle, where the gift was to "my sister, Charlotte, the wife of Thomas Horner, and her child or children."

The last case is *Re Loveland* (2), reported, since the case was argued before me, in the April number of the Law Reports. In that case the testator bequeathed £500 to Daisy Dorcas Wootton (otherwise Loveland), his niece, with whom he had gone through a form of marriage in Scotland, and then after some other legacies, he left the residue to trustees, upon trust, to pay the income to the said Daisy Dorcas Wootton for her separate use for life, "and from and after her decease in trust for all her children living at my decease, who, being sons, shall attain the age of twenty-one years, or being daughters shall attain that age, or marry under that age, in equal shares. And if there shall be only one such child, the whole to be in trust for that one child." Then there was a gift over if there was no child living at his decease. Swinfen Eady, J., after pointing out that the law on this subject had developed since the earlier cases, said that the question was whether, upon the true construction of the will, in the events that had happened, the infant child of the testator was contingently entitled to the residue, subject to her mother's life interest. "To answer this question," he says, "I have to consider whether there is, upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children,' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. In each case all the surrounding circumstances are to be taken into consideration. . . . Looking to the whole will, and to the relevant and admissible facts, I am satisfied, as matter of construction, that the word 'children' is used by the testator as including illegitimate children, and that he intended to provide for all children born . . . during his lifetime, or in due time after his death, although not born in lawful wedlock."

(1) 37 Ch. D. 695. (2) [1906] 1 Ch. 542.

He then shows that such a gift is not against public policy, because it prevents the offspring becoming a charge on public funds. The element in that case that the gift is confined to "her children living at my decease" does not exist here, and on the facts cannot.

But I think the gift in the will of Margaret Prosser is to be construed as to the wife of O'Loughlin; the words "for her separate use," and the prohibition against anticipation, support that view, and if so, it follows that the gift to her children is to the children of her and O'Loughlin. This fits in with the truth, as gathered from the surrounding circumstances.

Upon the whole I shall answer the question that illegitimate children of Mary Eliza O'Loughlin, born in the life of the testatrix, can take under the will of Margaret Prosser the property given to "children" of that person.

Solicitor for plaintiffs: *P. J. Brady.*

Solicitors for defendants: *W. G. Bradley & Son.*

R. D. M.

IN THE MATTER OF THE ESTATE OF THE MARQUIS OF LANSDOWNE.

Meredith, J. 1905. Nov. 10, 27.

Land Purchase Acts—Irish Land Act, 1903, *sects.* 12, 43—*Reserve Fund—Jurisdiction of the Estates Commissioners to make free grants for the purchase of stock and implements.*

The Estates Commissioners have jurisdiction to make free grants out of the Reserve Fund mentioned in section 43 of the Irish Land Act, 1903, to persons coming within the provisions of section 2 (1) (d) of the said Act, for the purchase of stock and implements.

QUESTION submitted to the Judicial Commissioner for his decision under sect. 23 (1) of the Irish Land Act, 1903. From the memorandum of the Estates Commissioners, the following facts appeared:—

On June 27th, 1905, the Estates Commissioners agreed, pursuant to the provisions of section 6 of the Irish Land Act,

Meredith, J. 1903, to purchase this estate, which consisted partly of tenanted and partly of untenanted land. The advances had not yet been made. Denis Moore, a person who, within twenty-five years of the passing of the Act, was the tenant of a holding to which the Land Law Acts applied, and who was not, at the date of the purchase, the tenant or proprietor of that holding, had undertaken to purchase a "parcel" of the said estate, containing 33A. 0R. 30P. and an undivided ninth part of 242 acres, by means of an advance of £1,076 from the Land Commission, and the Estates Commissioners had sanctioned an advance of that amount. The said Denis Moore had applied for assistance in re-stocking the lands, and the Commissioners, when allotting the said 'parcel' to the said Denis Moore, and sanctioning the said advance, considered that it would be necessary to assist him by means of a grant out of the Reserve Fund, and decided to make him a free grant of £130, to be expended as follows :—£80 on farm buildings, and £50 for purchase of stock and implements. The Commissioners were of opinion that the making of such grant was necessary to enable the said Denis Moore to use and enjoy the said "parcel" of land, and was expedient for the benefit of the estate and for the purposes of the Act. The following question was submitted—Whether the said proposed grant of £50 for the purchase of stock and implements could be made out of the Reserve Fund?

1905.

In re LANSDOWNE'S ESTATE.

The Solicitor-General (*J. H. M. Campbell, K.C.*) and *Edmond Coll*, for the Treasury :—

Where the Estates Commissioners take steps or execute works under section 12, such works must be for the benefit of the estate, for the improvement of the estate, for the use or enjoyment of the estate. "Estate" is the governing word. The section contemplates that whatever is done should have the element of permanency—permanency of enjoyment and permanency of the work done. As to the words "use and enjoyment," what is contemplated is, that the Land Commission shall have power to consolidate, enlarge, cut up, or distribute holdings. Sub-sect. 2 makes this absolutely clear. The section contemplates something being done to the lands which form the estate in a manner that enhances its value, but does not contemplate provision being made to meet the relative needs of

particular tenants by making grants to enable them to carry on farming operations.

Miles Kehoe, K.C., R. R. Cherry, K.C., and *J. Muldoon*, for Denis Moore:—

There is nothing in the section to show that the improvements must be for the permanent benefit of the estate. The words in sect. 12 (1), "use or enjoyment thereof," connect the lands with the worker. In construing the section regard must be had to the general finance of the Act. There are three distinct funds available for the purposes of the Act—(1) "the Irish Land Purchase Fund" created by section 27. Advances from this fund are of the nature of a loan, all of which is to come back to the Exchequer. (2) The Reserve Fund mentioned in section 43. It was intended that advances from this fund should not be repaid, but should be used for the special purposes mentioned in the Act. (3) "The Land Purchase Aid Fund" created by section 47. It was intended that this fund should be used for the purpose of aiding the sale of estates under the Act, and should not be repaid. As the Land Purchase Aid Fund was intended to be used for the benefit of vendors, so the Reserve Fund was intended to be used for the benefit of tenants. The argument that there is no security in the event of grants being made from the Reserve Fund for the purchase of stock and implements is met by the fact that this fund is a rolling fund. The real intention of section 12 is to enable the Land Commission to do for (*inter alia*) persons coming within the provisions of sect. 2 (1) (*d*) what prudent tenants would do for themselves.

Herbert Wilson, K.C., and *Edward S. Murphy*, for the Marquis of Lansdowne:—

In section 12, the words used are most general, "or generally for the purposes of this Act." One of these purposes is to carry out the provisions of section 2. The opening words, "may take such steps," are also used with reference to the powers of the Congested Districts Board in section 39 of the Purchase of Land (Ireland) Act, 1891, and are words of very wide application.

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Nov. 27.

MEREDITH, J.:—

In this case the Estates Commissioners have embodied in their memorandum the facts necessary to enable me to pronounce a decision upon a serious question of law. [His Lordship read the memorandum.]

On these facts the Estates Commissioners submit the question of law—Whether the said proposed grant of £50 for the purchase of stock and implements can be made out of the Reserve Fund?

The Estates Commissioners, it will be observed, do not ask any question with reference to the £80 portion of the free grant of £130. The £80 is to be expended on farm buildings. My decision in the *Wills-Sandford Estate* (1) has established that the Estates Commissioners are authorised and justified in making a grant of that description. The Solicitor-General, in opening the present case on behalf of the Treasury, accepted the decision in the case of the *Wills-Sandford Estate* (1) as an accurate interpretation of so much of sections 12 and 43 of the Act of 1903 as applied to the facts of that case. But the decision, I admit, must be read in the light of the facts of the case; and I agree with the Solicitor-General that the question now submitted to me involves an extension of the decision in the *Wills-Sandford Estate* (1), and the application of that decision to an entirely different subject-matter. In that case I decided that the provisions of section 12 applied as well to estates sold under sections 1 to 5 as to estates purchased by the Land Commission under section 6 or section 7. I held that where an estate is purchased or proposed to be purchased, whether by direct sale from landlord to tenant under sections 1 to 5, or through the Land Commission under section 6 or section 7, the Estates Commissioners have power and jurisdiction under section 12 (1) to make advances or free grants to the purchasing tenants for the benefit or improvement of their holdings comprised in the estate. I also held that there is only one fund out of which the money required by the Estates Commissioners for such purposes can be drawn, namely, the Reserve Fund mentioned in section 43. Dealing with section 12 (1), I said: "Words of wider import or fuller significance it is hardly possible to conceive. In

(1) [1905] 1 I. R. 597.

the absence of any provision to the contrary—and I can find no such provision—I hold that the *Estates Commissioners have clear jurisdiction to take the steps suggested in the present case* for the benefit or improvement of the estate or for the use or enjoyment thereof. The learned counsel for the Treasury doubted whether a free grant of money comes within the intendment of the Statute. I have no doubt that it does. Indeed, I might go further and say that it would be strange if such wide words should be held capable of such a narrow interpretation." I further pointed out that I had no power to say whether the jurisdiction of making a free grant of money should be exercised by the Estates Commissioners in any particular case. My function was to determine whether the jurisdiction did, or did not, exist. I said further: "In my judgment section 43 is the complement of section 12 (1). It, so to speak, finances the earlier section. Mr. Matheson referred to the marginal note: 'provision for the expenses of improvements,' and without suggesting that it should be regarded as part of the Statute, argued that it was, in fact, a concise summary of the object, intention, and scope of the section. I agree, subject to this observation that section 43 is not confined, and of course could not by any marginal note be confined, to 'improvements' alone. The words of the section are 'benefit or improvement,' and plainly include steps taken for the benefit of the estate, as well as, and in addition to, improvement works." I adhere to all I decided and all I said in *Wills-Sandford's Estate* (1): and further consideration has led me to the conclusion that I was right in pointing out that the word "benefit" is a word of wider import and of greater significance than the word "improvement" mentioned in the sections under consideration.

I shall refer to two cases which, although they are not decisions under the Land Acts, are, nevertheless, of some interest as showing that the word "benefit" has been considered to have a much wider meaning—at all events as regards persons—than technical words like "advancement" or "preferment."

In *Lowther* v. *Bentinck* (2), Sir George Jessel held that the word "benefit" was a term of wider application than "preferment

(1) [1905] 1 I. R. 597. (2) L. R. 19 Eq. 166.

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or advancement." He says: "The words which precede those which I have to construe are 'preferment or advancement,' both large words, but both words having, I may say, a well-known legal meaning. They are followed by the words 'or otherwise for his benefit,' which are the largest terms of all." The second case is that of *In re Brittlebank* (1), in which case also the word "benefit" received a wider interpretation than the technical term "advancement."

I base my decision in the present case upon the word "benefit," which is wider than the word "improvement." The latter word might possibly be held to have a technical meaning in every Irish Land Act. The former is free from legal technicality. The Solicitor-General, however, argued that, whether the Estates Commissioners take steps or execute works, they must be works for the benefit of the estate, for the improvement of the estate, for the use and enjoyment of the estate, and that "estate" is the governing word. Mr. Kehoe somewhat resented the omission from the Solicitor-General's argument of the words "or untenanted land." I think it makes no difference, for whether these words are dwelt upon, or whether the word "estate" alone is taken, the Solicitor-General's argument remains the same. The works must, according to his argument, be visible physical works which will benefit, improve, or facilitate the use or enjoyment of the estate; the steps must, *per se*, be calculated to benefit or improve or facilitate the use or enjoyment of the *estate*. Speaking generally, I concur in the argument of the Solicitor-General. But I differ from him in thinking or holding that the steps to be taken for the benefit of the estate may not be indirect steps, resulting in benefit to the estate, as well as direct steps such as were taken or contemplated in the *Wills-Sandford Estate* (2). I can find nothing in section 12 or in section 43 to narrow down the words "benefit . . . of Estates" to visible physical works, whether of a permanent or of a temporary character. It seems to me that if the Estates Commissioners, in the exercise of the discretion which is undoubtedly conferred upon them, deem it expedient that lands on an estate, whether tenanted or untenanted, should not be left

(1) 30 W. R. 99. (2) [1905] 1 I. R. 597.

uncultivated, because the tenants or proposed proprietors have not got the implements of husbandry necessary to enable them to cultivate the lands: if they hold that the lands should not be left unstocked because the tenants or proposed proprietors have got no means of stocking them: if they consider that the worst that can happen to an estate is the occupation of any considerable portion of it, or all of it, by persons who have no farm implements and no stock, but who, under the powers conferred by the Act of Parliament, are put into possession of holdings or parcels on the estate: if they consider that such persons should not be driven to a system of conacre, which, in my experience as a Judicial Commissioner under the Land Law Acts, is about the most disastrous method of deteriorating land and diminishing its value: and if they consider that the tenant proprietor should not be forced, as a condition precedent to obtaining any real benefit from, or use or enjoyment of, his lands, to resort to the money-lender to borrow capital with which to start, and thus commence the new proprietorship incumbered with a load of debt: *then* I say that, in my opinion, it is, within the meaning of the statute, *lawful* for the Estates Commissioners to say—These grants for the purchase of farming implements, these grants for the purchase of stock, will result in benefit to the estate; and in the exercise of the discretion conferred upon us we will make the advance.

The duties imposed by sections 1 to 23 of the Act of 1903 have been entrusted solely to the Estates Commissioners subject to the provision contained in section 23 (8), as pointed out in the judgment of the Lord Chief Baron in the case of *Talbot Crosbie's Estate* (1). Beyond all doubt the question of expediency is one for the Estates Commissioners alone. All I can say is that, if the Estates Commissioners consider it *expedient*, the words of the section are wide enough to render it *lawful* for them to make a free grant to a person coming within section 2 (1) (*d*) of the Act, *i.e.* a person who within twenty-five years before the passing of the Act was a tenant of a holding to which the Land Law Acts apply, and who is not at the date of the purchase the tenant or proprietor of that holding. I do not narrow my decision to such persons.

(1) [1905] 1 I. R. at p. 572.

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But where the Legislature has enabled the Estates Commissioners to place upon untenanted portions of estates persons who were evicted from their holdings at any time within twenty-five years before the passing of the Act of 1903, it must have been within the contemplation of the Legislature that many such persons would be without means, and it is not unreasonable or extraordinary to suppose that, when making provision for the benefit or improvement of the estate, the Legislature should have considered that, in distributing or dealing with the funds entrusted to their care and discretion, the Estates Commissioners should be at liberty to take steps for the benefit of the estate, through the indirect method of placing the proprietor of a parcel of land in possession of funds which alone would enable him to cultivate it, to till or to stock it, without being obliged to resort to the money-lender. One of the purposes of the Act undoubtedly is the distribution of untenanted lands among the persons mentioned in section 2; but it must be remembered that tenants, or persons to whom parcels of lands have been allotted, must pay their purchase annuities, and I think it was within the intendment of section 12 that the Estates Commissioners should have the power, out of the funds at their disposal, to enable such persons efficiently to work and manage their lands, and so secure to them the means of paying their purchase annuities. Every parcel of land suitably used and properly cultivated by a resident proprietor results in benefit to the estate.

I have before me a return which I think goes far to remove one of the objections made by the Solicitor-General to this extension of the principle in the *Wills-Sandford Estate* (1). The Solicitor-General asked who can restrain the tenant from selling the cattle that he has purchased with the grant, or from selling the implements, or who can prevent his creditors from coming down upon him at once and seizing them? The Land Purchase Acts have now reached a stage at which the questions of the payment of instalments, of interest in lieu of rent, and other matters, have assumed gigantic proportions. I think I am entitled to say that the figures show that the Land Act of 1903 has been successful not merely as regards the amount of work that has been done, but

(1) [1905] 1 I. R. 597

also in respect of the punctual payments that have been made by purchasers; and it does occur to me that any suggestion that the tenant proprietors might be disposed to make away with the stock that they have purchased, is not one that need be very seriously discussed. It is possible that some may be disposed to do so; but then there are exceptions to every rule. I have confidence that, if the powers given to the Estates Commissioners are exercised in cases like the present, no substantial or material loss will result to the State. I answer the question submitted to me in the affirmative.

Solicitor for the Treasury: *Sir Patrick Coll.*
Solicitor for Denis Moore: *Valentine Kilbride.*
Solicitors for the Marquis of Lansdowne: *Reeves & Sons.*

J. E. W.

MOFFETT *v.* GREENE.

Lease for lives renewable for ever—Covenant to renew—Assignment—Specific performance—23 & 24 Vict. c. 154, ss. 14, 15.

The defendant, who was assignee of the lessee's interest in a lease for lives renewable for ever, assigned his interest to H. on March 7th, 1905, and gave notice in writing of the particulars of the assignment to the plaintiff, in whom the lessor's interest was vested, on March 14th, 1905. The gale-day next following the date of the notice was May 1st, 1905. On April 4th, 1905, an equity civil bill was brought to obtain specific performance of the covenant to renew:—

Held (affirming the decision of the County Court Judge), that the assignment to H. was valid and binding on the landlord, and that, it not being in the power of the defendant to effectively perform his part of the covenant to renew, a decree for specific performance should not be given.

COUNTY COURT APPEAL.

Appeal from an order of the County Court Judge of County Down, dated 8th January, 1906, dismissing, on the merits, the plaintiff's equity civil bill. The defendants were John J. F. Greene, the committee of the estate of John Collins—a person of unsound mind, so found—and the said John Collins. The equity

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civil bill prayed for a declaration that the defendant Collins, by his committee, the defendant Greene, was bound to accept a fee-farm grant of the premises comprised in certain indentures of lease for lives renewable for ever, dated, respectively, the 8th September, 1810, and 6th March, 1839, and to pay renewal and septennial fines. By the indenture of 8th September, 1810, which was made between Robert Moffett of the one part and Daniel Collins of the other, the premises were demised to Daniel Collins for three lives renewable for ever, the said Daniel Collins covenanting within six months after the death of every life to nominate and appoint another person in the place of every person so dying, and to pay a renewal fine on every such renewal. There was an indenture of renewal dated 6th March, 1839, from Eliza Moffett and others to Catherine Collins, and it was admitted that all the lives in this renewal were now dead. The plaintiff was now entitled to the lessor's interest in the lease; the defendants had become entitled to the lessee's interest, and the plaintiff by notice in writing, dated 14th March, 1905, had called upon the defendants to take out a fee-farm grant pursuant to the provisions of the Renewable Leasehold Conversion Act, and to pay the fines due. By order of the Lord Chancellor, dated 31st October, 1904, the defendant Greene, the committee of the estate of the other defendant Collins, was directed to proceed, as he might be advised, to dispose of the property demised by the lease "with a view of relieving the estate of the lunatic from further liability under the said lease." Acting under that order, the lessee's interest in the lease was by deed dated 7th March, 1905, assigned to John Henessey, of Newry, and by notice dated 14th March notice of the particulars of such assignment was given to the plaintiff. The gale-day next following the service of the notice was May 1st, 1905. The equity civil bill was served on April 4th, 1905.

S. L. Brown, K.C., and *Dromgoole*, for the plaintiff and appellant, said the question at issue turned upon sect. 15 of 23 & 24 Vict. c. 154 (1). The covenant in the lease to take a renewal runs with

(1) Section 15: "Every tenant, being an assignee as aforesaid, who shall have assigned his estate or interest in the lease or other contract of tenancy in the interval between two gale-days, shall, notwithstanding such assignment,

the land, and is not merely a personal covenant: Furlong's Landlord and Tenant, Vol. I., p. 560. That being so, and the defendant being liable until the gale-day following the service of notice, the plaintiff was entitled to specific performance. The County Court Judge had apparently relied upon *Muller* v. *Trafford* (1); but that case was not an authority for the proposition for which it was used.

Serjeant Dodd and *Cusack*, for the defendants:—

The assignee has not been made a party to the suit, and that has been held to be a perfect answer to a claim for specific performance. This was an attempt to make a person who was in as assignee have all the liabilities of an original tenant, and to deprive him of the protection of section 14 of 23 & 24 Vict. c. 154 (2). The interpretation of the statute could not be affected by the fact that the assignee was a pauper. The nature of the renewal covenant was explained in Lyne on Leases, at p. 7, and in chap. v., p. 145. The covenant in this case ran not with the land, but with the estate of the lessee in the land, and the question was whether the plaintiff was entitled to a decree for specific performance against a person who was not lessee at the time of the bringing of the action: *Ward* v. *M'Roberts* (3); *Fitzgerald* v. *Fitzgerald* (4); *De La Poer* v. *Kirwan* (5); Cherry's Irish Land Law, p. 29.

be liable, as assignee, to the payment of the rent and the performance of the agreements contained in the lease or other contract, up to and including the gale-day next following the service of notice of the said assignment."

(1) [1901] 1 Ch. 54.

(2) Section 14: "No landlord or tenant, being such by assignment, devise, bequest, or act and operation of law only, shall have the benefit, or be liable in respect of the breach, of any covenant or contract contained or implied in the lease or other contract of tenancy, otherwise than in respect of such rent as shall have accrued due, and such breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee: Provided, however, that no assignment made by any assignee of the estate or interest of any tenant shall discharge such assignee from his liability to the landlord, unless and until notice in writing of the particulars of such assignment shall have been given to the landlord."

(3) 25 L. R. Ir. 224. (4) 1 Ir. C. L. R. 347. (5) I. R. 9 C. L. 519.

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Dromgoole, in reply, referred to sections 12 and 13 of 23 & 24 Vict. c. 154. It was admitted that John Collins was an assignee of the premises. Before March 7th, 1905, he was undoubtedly liable, and the question was—When was his liability terminated?

May 9.

BARTON, J.:—

The County Court Judge was, in my opinion, right in dismissing this bill for specific performance. I say nothing as to the defendants' liability for damages, or as to the liability of Henessey to accept a renewal of the lease, if called upon to do so. These questions do not arise upon this equity civil bill, which claims no other relief than specific performance against Greene and Collins. That relief seems to me to be from its nature inapplicable to a case of this kind, because it is no longer in the power of the defendants to effectively perform their part of this covenant. They had, before being called upon to accept a renewal of the expired lease, assigned all the lessee's estate and interest in the premises, with the burden and benefit of all covenants running with that estate, to Henessey, by an assignment binding on the landlord. It is true that section 15 prolonged until the next gale day their liability in respect of the rent, and the agreements in the lease; but that section did not invalidate the assignment to Henessey. Accordingly the case seems to me to belong to that class of cases of breach of contract, in which this Court refuses specific performance on account of the incapacity of the defendant to effectively carry out his part of the contract. It may be that the plaintiff might recover damages from the defendants for breach of agreement, but he cannot obtain a relief, to which, in the circumstances of the case, and in the events which have happened, the defendants are no longer capable of giving effect. The plaintiff must pay the costs of the appeal.

Solicitor for the plaintiff: *Robert A. Mullan.*
Solicitors for the defendant: *Sheridan & Russell.*

W. M'G.

IN RE MURPHY, DECEASED.
MURPHY *v.* HYNES AND SIRE.

Barton, J.
1906.
Feb. 12.

Will—Bequest to Superior of Franciscan Capuchin Order—Validity of—Roman Catholic Relief Act (10 *Geo.* 4, *c.* 7).

A testator by his will directed that his trustees should divide "the remainder of my residuary estate equally between the Superior of the Franciscan Capuchin Monastery, at Rochestown, Co. Cork, in aid of the school there for the education of priests for the foreign mission, and the Superior of All Hallows College, Dublin, in aid of the school there for the education of priests for the foreign mission." There was no question as to the validity of the gift to All Hallows College:—

Held, that the gift to the Superior of the Franciscan Capuchin Monastery for the education of priests "for the foreign mission" was not invalid as being contrary to the policy of the Roman Catholic Relief Act (10 Geo. 4, c. 7).

ORIGINATING SUMMONS.

This came before the Court on an originating summons on behalf of the executor of the will, dated 21st January, 1903, of Rev. Timothy Canon Murphy, asking to have the following question decided, namely, whether the following, so far as it related to the Superior of the Franciscan Capuchin Monastery at Rochestown, Co. Cork, was a valid bequest:—

"I direct that the trustees or trustee shall divide the remainder of my residuary estate equally between the Superior of the Franciscan Capuchin Monastery at Rochestown, Cork, in aid of the school there for the education of priests for the foreign mission, and the Superior of All Hallows College, Dublin, in aid of the school there for the education of priests for the foreign mission."

In an affidavit dealing with the application, the plaintiff, Very Rev. Jeremiah Canon Murphy, stated that "the difficulty in connexion with the said bequest is that, so far as I am aware, the said Franciscan Capuchin Monastery at Rochestown is merely

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a novitiate for the priests of the Irish province of the Order, and is not a school for the education of priests for the foreign mission, and does not comprise any school maintained specifically for that purpose." He exhibited correspondence which his solicitor had had with the authorities of the Franciscan Capuchin Order, in which they stated that they were prepared to devote the bequest to the education of priests for the foreign mission; that they had already been taking steps to enlarge the school at Rochestown for the purpose of the education of priests for the foreign mission; that in Rochestown they had educated missionaries before, and that they expected to have many more in the near future. They added that the school at Rochestown was recognized by, and was in connexion with, the chief Irish educational boards, and that the testator had known perfectly well what the school was. In an affidavit of Rev. Thomas J. Hynes, the Superior of the Monastery at Rochestown, he stated that there was a school at Rochestown under his control which was fully equipped for modern educational requirements; that the Franciscan Capuchin Order was a missionary Order to as great an extent as any of the other great Orders of the Roman Catholic Church; and that the Irish Province to which the house at Rochestown belonged had contributed members to its foreign missions in due proportion to its numbers. In the British Empire abroad three dioceses and two prefectures were in the hands of the Capuchin Order; there was a demand for priests for the foreign mission; and before the bequest was known a scheme had been considered for the enlargement of the school at Rochestown for the express purpose of meeting the expected demand for additional priests for the foreign mission. There was no profit realized by the Order out of the school, and the bequest would be devoted, not to the general purposes of the Order, but, in accordance with the directions of the testator, to the education of priests for the foreign mission. He believed that the deceased well knew the circumstances and conditions of the school at Rochestown, and that it was a school engaged in the education of missionary priests for home and abroad, and that it was ready and competent to educate priests for the foreign mission.

A. M. Sullivan, for the plaintiff.

Doyle, K.C., for the defendant, said the clause in the will was very like the clause in *Roche* v. *M'Dermott* (1), but such a clause was not caught by the Roman Catholic Relief Act, 10 Geo. 4, c. 7. Being for a foreign mission, the gift was good, though it would have been bad if it had been for the training of students to be priests in Ireland.

O'Brien, K.C., for the next-of-kin, submitted that there was a clear distinction between this case and *Roche* v. *M'Dermott* (1); but if the Court could see its way to hold the gift good, notwithstanding that distinction, no one would be better pleased than his clients. But the evidence showed that there was no "school there" for the education of any foreign missioners save Capuchins. [He referred to *Sims* v. *Quinlan* (2), *Walsh* v. *Walsh* (3), *Kehoe* v. *Wilson* (4).]

BARTON, J.:—

The main objection to this bequest is founded upon the penal clauses of the Emancipation Act. I respectfully adopt what was said as to those clauses by the Master of the Rolls in *Roche* v. *M'Dermott* (5). For more than half a century nobody has ever dreamt of enforcing them for any of the purposes for which they were originally enacted. In fact, they are never taken down from the dusty shelf, to which they have been so long relegated, except for the purpose of defeating the otherwise lawful intentions of testators. I must, of course, give effect to them, if the language of the will constrains me. But I do not think that they have an application to this bequest. The purpose of this gift is the education of priests "for the foreign mission"; and the evidence shows that the "foreign" mission operates in certain portions of the Empire, including India and Somaliland. It would seem a strange result, if it were contrary to our law, or to the policy of our law, for a Christian community to educate missionaries for missionary work

(1) [1901] 1 I. R. 394. [43.
(2) 16 Ir. Ch. R. 191; 17 Ir. Ch. R.
(3) I. R. 4 Eq. 396.
(4) 7 L. R. Ir. 10.
(5) [1901] 1 I. R. 394, at 401, 402.

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in the British Empire. In my opinion, these penal clauses, which should be read strictly, do not apply. They were apparently aimed at preventing members of monastic orders coming into or staying in the realm. But there is no such purpose in this bequest; and I hold it to be valid.

Solicitor for the plaintiff: *Maurice Healy.*
Solicitor for the defendant: *Michael Murphy.*
Solicitors for the next-of-kin: *Hanrahan & Co.*

W. M'G.

Ross, J. 1906. June 7.

IN THE MATTER OF THE ESTATE OF WILLIAM PARKE CULLEN AND OTHERS, OWNERS; WILLIAM IRWIN, PETITIONER.

Practice—Incumbrance—Jurisdiction—Sale of land to pay arrears of fee-farm rent.

The appointment several years ago of a receiver for the purpose of recovering the arrears of a fee-farm rent having proved an insufficient remedy, the Court ordered a sale of the lands.

APPLICATION, on behalf of the petitioner, that the petition in the matter be fiated, the Registrar having put a query on the petition, to the effect that on the authority of *In re Tipping* (1) the Court had no jurisdiction to entertain a petition for the sale of lands for the recovery of arrears of a fee-farm rent.

The lands of Carrowmore were, in the year 1811, granted in fee-farm to the Commissioners of First Fruits, subject to the yearly fee-farm rent of £55 7*s.* 8*d.* The grantees' interest, after several mesne assignments, became vested in the owners in the matter. The rent having fallen into arrear, in the year 1881 a petition for sale and a receiver was presented by the then owner of the rent, the arrears amounting to £193. An order on that petition was

(1) 2 Ir. Jur. 172.

made by Flanagan, J., appointing a receiver, but no order for sale was made. The arrears of rent having increased to £591, up to 1st November, 1905, the present proceedings were brought for a sale of the lands (1).

A. W. Murray, for the petitioner.

[Ross, J., referred to *In re Tipping's Estate* (2).]

A. W. Murray:—

Tipping's Estate (2) was decided on the Incumbered Estates Court Act (12 & 13 Vict. c. 77), but does not apply to the present case. The interpretation of the word "incumbrance" is wider in the Landed Estates Court Act, as it embraces all the cases comprised in the Incumbered Estates Court Act, and in addition all cases in which a Court of Equity would order the appointment of a receiver.

Ross, J.:—

The fact that Flanagan, J., has already appointed a receiver brings the incumbrance within the express words in the Landed Estates Court Act, and I, therefore, give leave to fiat the petition.

Solicitors for the petitioner: *Longfield, Kelly, & Armstrong.*

D. M. S.

(1) Section 1 of the Landed Estates Court Act (21 & 22 Vict. c. 72) is as follows:—"The word 'incumbrance' shall mean . . . every . . . charge upon land which is deemed an incumbrance in a Court of Equity, and which a Court of Equity would discharge by a sale of the land charged or by the appointment of a receiver over the same."

(2) 2 Ir. Jur. 172.

Meredith, J. 1905. IN THE MATTER OF THE ESTATE OF CECILIA FALLON.

Nov. 17, 21. *Vendor and purchaser—Agreement to purchase by the Congested Districts Board—Clause as to adjustment on allocation of the purchase-money in the event of a discrepancy in the rental being discovered—Claim by the vendor—Advance of the extra purchase-money claimed under the Land Purchase Acts.*

Where an estate was sold to the Congested Districts Board under an agreement which, *inter alia*, provided that "if any discrepancy should be discovered in the rental as set forth in the originating request, the same should be adjusted on the allocation of the purchase-money," but time was not of the essence of the contract, and when the purchase-money advanced in respect of the estate had been practically distributed, the vendor claimed to be entitled to compensation, on the ground that, in the originating request, the rental of the lands sold, on which the purchase-money had been calculated, had been erroneously stated, to her prejudice:—

Held, that the clause in the agreement was one which applied as well in favour of the vendor as of the purchaser, and that the Congested Districts Board were bound to compensate the vendor for the extra value actually received.

Held, also, that, under the circumstances of the case, the Land Commission had jurisdiction to sanction the advance, under the Land Purchase Acts, of the extra purchase-money claimed.

APPLICATION by the Congested Districts Board for an additional advance of £642 in respect of the purchase-money of the estate, being an additional sum claimed by the vendor as representing the estimated value of a discrepancy between the rental set out in the originating request, on which the purchase-money had been calculated, and the rental as revised by the Inspector of the Congested Districts Board.

The originating request was lodged on 20th May, 1904. The rental, as therein set out, was £550 16*s.* 2*d.* At the foot of the rental there was the following statement by the vendor —"I hereby certify the above rental to be correct in every particular according to the best of my knowledge, information, and belief, and I hereby agree that if any errors be discovered in

the rental as set out, or in the amount of arrears due, the purchase price agreed upon may be adjusted by the Judicial Commissioner on the allocation of the purchase-money."

On 9th June, 1904, a resolution was passed by the Congested Districts Board declaring the lands comprised in the originating request fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903, and resolving to purchase the estate therein comprised for the sum of £16,037. On 6th January, 1905, a formal agreement was entered into between the vendor and the Congested Districts Board with reference to the sale of the estate. The agreement contained the following clause:—"If any discrepancy is discovered in the rental as set forth in the originating request, the same shall be adjusted on the allocation of the purchase-money." After the lands had been vested in the Board, and the purchase-money practically distributed, the rental, as revised by the Inspector of the Congested Districts Board, was ascertained to be £580 18*s*. The vendor thereupon claimed the sum of £642, as representing the estimated value of the discrepancy. The Congested Districts Board were all along willing to pay this extra sum in respect of the purchase-money of the estate, from the time when the discrepancy was discovered. The present application was accordingly made.

C. A. O'Connor, K.C., for the vendor.

A. P. Ross, for the Congested Districts Board.

Cur. adv. vult.

Nov. 21.

MEREDITH, J.:—

In my opinion the contract entered into between the Congested Districts Board and the vendor is a clear one, and the Congested Districts Board would not be acting properly if they refused to pay the extra purchase-money. It is only right to the Board to say that they have never refused to pay. It is possible that to some minds it may seem peculiar that, when a definite sum has been named as the purchase-money of an estate, and that sum has been practically distributed, the vendor should be at liberty to re-open the matter, and to say: "I am entitled to a further sum of purchase-money." But in the agreement of January 6th, 1905, the

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following clause was inserted: "If any discrepancy is discovered in the rental, as set forth in the originating request, the same shall be adjusted on the allocation of the purchase-money."

I do not think that the word "adjusted" can mean adjusted only in favour of the purchaser. I think that both grammatically and legally the term must apply in favour of the one side as well as of the other. It is a give-and-take condition, and on the original allocation of the purchase-money, if application had been made to me, I should have been bound, as a matter of course, to adjust the balance according to the equity and the justice of the case, by taking note of the discrepancy and saying either that the purchase-money should be increased or that it should be diminished; in other words, if the vendor had made a mistake in her own favour, I should have directed her to return portion of the purchase-money to the Congested Districts Board, or if the mistake was to her own prejudice, I should have declared her entitled to receive more purchase-money from the Congested Districts Board. Now, the point of time mentioned in the condition to which I have referred was allowed to pass, but in circumstances which would have made it inequitable for the vendor, on the one hand, or for the Congested Districts Board, on the other, to have relied on the strict letter of the contract (as regards time) by way of defence to a claim for adjustment. In point of fact the Congested Districts Board did not at any time desire to rely upon any technical point or to raise any technical defence. Neither did the vendor at any time desire to do so. The inquiries necessary to enable any adjustment to be made had not been completed when the case was ripe for allocation. This was known to both parties.

I hold that on the facts of this case the adjustment may still be made in accordance with the justice of the case. But, for a time, I was disposed to think that there was a serious difficulty in the way of *advancing* this further purchase-money to the Congested Districts Board for payment by them to the vendor. The difficulty to which I refer arose with reference to rule 8 of the rules made by the Lord Lieutenant under sect. 79 (1). The rule provides that "any resolution adopted by the Board, with reference to the proposed purchase, shall state the price which, on the vendor's proposal, the Board have provisionally agreed to pay

for the estate, provided the lands are vested in the Board in fee-simple, discharged of superior interests, save as provided in said Act, and also the terms, as to arrears of rent, payment of interest, and otherwise, and the conditions (if any) upon which it is proposed that the vendor may re-purchase the demesne, or other lands from the Board; and shall also specify any condition as to compensation or allowance, *for any error in the rental*, to be assessed by the Judicial Commissioner on the distribution of the purchase-money." The resolution in the present case is dated June 9th, 1904. It is as follows:—"The Congested Districts Board hereby resolve to purchase the estate comprised in the originating request sworn the 20th day of May, 1904, by the above-named vendor, in fee-simple, discharged from the claims of all persons as specified in sect. 16 of the Irish Land Act, 1903, but subject, as therein mentioned, for the sum of £16,037." My first impression was that as the resolution contained no reference to adjustment, it would not be possible for the Land Commission to advance the further purchase-money, notwithstanding the fact that the Congested Districts Board were bound to pay the additional sum to the vendor. On further consideration, I am of opinion that my first impression was incorrect. The resolution refers to the originating request, and, in my judgment, incorporates the request. Looking at the request and the rental, which forms part of it, I find the following statement by the vendor, at the foot of the rental:—"I hereby certify the above rental to be correct in every particular, according to the best of my knowledge, information, and belief, and I hereby agree that if any errors be discovered in the rental as set out, or in the amount of arrears due, the purchase price agreed upon may be adjusted by the Judicial Commissioner on the allocation of the purchase-money." Accordingly, reading the resolution and request together, I have come to the conclusion that I have jurisdiction, in my capacity as Judicial Commissioner, to make an advance of the extra purchase-money, and that, under the circumstances of this case, I ought to do so. I shall, therefore, direct the advance to be made.

In these matters one only learns by experience. What I suggest is this—that, in future, the right of adjustment should be more definitely and clearly set out in the resolution and in

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the agreement itself. The resolution should comply, not only by incorporation, but by express words, with the terms of the rule made by the Lord Lieutenant. I think that the point of time ought to be made, by express words, of the essence of the contract between the parties. In this case it would have been impossible to have defended an action on the question of the point of time, but there may be cases in which, from the vendor's or the purchaser's point of view, extremely nice questions of law may arise, and may have to be determined.

I would suggest that the Congested Districts Board should make it a part of the essential terms of the contract that no claim for adjustment, and no application for further purchase-money, or for the return of any of the purchase-money, should be allowed after a specified date.

It is only right for me to emphasize the fact that the Congested Districts Board were always quite willing that the extra purchase-money should be paid; but I could not sanction the advance until I was satisfied that the vendor's claim for compensation could be legally enforced, and that the circumstances were such as would justify me in directing the advance to be made.

Solicitor for the Congested Districts Board: *J. O'Connor.*
Solicitors for the vendor: *Maxwell & Weldon.*

J. E. W.

IN THE MATTER OF THE ESTATE OF JAMES D. CROSBIE.

Meredith, J.
1906.
April 20.

Land Purchase Acts—Agreements for sale—Arrangement that the purchase-money applied for should include a sum to be paid by the vendor to the purchasing tenant for improvements—Advance.

Where, in the case of the sale of an estate to the tenants direct, under the Irish Land Act, 1903, agreements for sale to certain tenants at prices within the zones had (amongst others) been lodged with the Land Commission, and it appeared that it was part of the agreement in each case that the vendor, on receiving the purchase-money, should pay to the tenants certain specified sums for the purpose of enabling them to improve their holdings, and that in each case the improvements had been executed, while in one case the specified sum had been paid, and in another a sum on account had been paid, by the vendor. On a question arising as to whether the entire of the purchase-money agreed upon could be advanced under the Land Purchase Acts:—

Held, that the entire purchase-money could not be advanced, but that the balance, after deducting the specified sums so agreed to be paid by the vendor in each case, could be advanced for the purchase of the holdings.

QUESTIONS submitted to the Judicial Commissioner, under section 23 (1) of the Irish Land Act, 1903. From the memoranda of the Estates Commissioners, the following facts appeared. The estate was being sold by the owner to the tenants direct. In the case of James Driscoll, the agreement for purchase set forth the purchase-money of the holding as £984, and the purchaser had applied for an advance of that amount. The Estates Commissioners had been informed by the owner that it was part of the agreement for purchase that, when the said sum of £984 had been advanced and paid to the owner, he should pay thereout to the purchaser the sum of £70, to be expended by the purchaser in the erection of a hay-shed on the said holding. On the faith of the said agreement, the hay-shed had since been erected by the purchaser.

In the case of Stephen Halloran, the agreement for purchase set forth the purchase-money of the holding as £353, and the purchaser had applied for an advance of that amount. The

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Estates Commissioners had been informed by the owner that it was part of the agreement for purchase that, when the said sum of £353 had been advanced and paid to the owner, he should pay thereout to the purchaser the sum of £20, to be expended by the purchaser in covering the farm buildings on said holding with corrugated iron. On the faith of said agreement, the said buildings had since been covered with corrugated iron by the purchaser, and the owner had paid him the said sum of £20.

In the case of Patrick Egan, the agreement for purchase set forth the purchase-money of the holding at £629, and the purchaser had applied for an advance of that amount. The Estates Commissioners had been informed by the owner that it was part of the agreement for purchase that, when the sum of £629 had been advanced and paid to the owner, he should pay thereout to the purchaser the sum of £50, to be expended by the purchaser in building a hay-shed on said holding. On the faith of said agreement, the said hay-shed had since been built by the purchaser, and the owner had paid him £30 on account of said sum of £50.

In all these cases, the prices agreed upon brought the amount of the advances applied for within the zones.

The following questions were submitted:—Whether the entire of the said sums of £984, £353, and £629 could be advanced out of the Land Purchase Fund, or whether such advances should be limited to the sums of £914, £333, and £579, respectively, being the prices agreed upon, less the sums of £70, £20, and £50, respectively, so arranged to be paid as aforesaid?

Ronan, K.C., and *Bourke, K.C.*, for the vendor:—

Once the amount of purchase-money has been agreed upon between the vendor and the purchaser, the Land Commission have no jurisdiction to inquire into the considerations which affected the minds of the parties in coming to an agreement as to the amount. There is nothing in the Land Purchase Code to narrow down the meaning of what is purchase-money. The improvements have in all cases been executed. Accordingly, the security for the advance has been increased.

Healy, K.C., for the purchasing tenants, supported the arguments put forward on behalf of the vendor.

The Solicitor-General (*Redmond Barry, K.C.*) and *Edmond Coll*, for the Treasury:—

The sum mentioned in the agreements for purchase must be purchase-money, and purchase-money alone. These sums agreed to be paid by the vendor to the purchasing tenants are not purchase-money, in the true sense of the word, and cannot be advanced under the Land Purchase Acts.

MEREDITH, J.:—

I regard this case as one of great importance, and should certainly reserve my decision, and give my opinion after further consideration of the matter, were it not that, when the case came before me in the first instance, it appeared to me overwhelmingly clear, on the arguments then presented, that if the facts, stated *on information* in the original minutes, really existed, then the question of law was not capable of argument. Whether the case of Halloran, or Egan, or Driscoll, be taken, and whether the vendor intends in each case to retain the bonus for himself, or in some cases, as stated by his solicitor, to hand it over to the purchaser, the result is the same. Either the landlord obtains from the State a bonus of 12 per cent. on a mere loan transaction between landlord and tenant, or the tenant obtains, in like manner, from the State a bonus of 12 per cent. on a loan agreed to be made by the landlord, but deferred until the landlord has been paid the purchase-money. I see the force of Mr. Ronan's argument—that as improvements have been actually completed, and paid for in Halloran's case, the security for the advance is increased—but I also see that if the landlord allows the sum of £20 to be treated as part of the purchase-money, he is tempering philanthropy with 12 per cent. He has agreed to make a loan of £20 to enable a tenant, with whom he is parting, to improve a building—an object highly commendable in itself. I do not say anything to prevent vendors from granting anything in their power to improve the condition of the buildings of those who are about to become owners in fee-simple; but that the law,

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as enacted, enables a landlord to convert his generosity into purchase-money, *plus* 12 per cent., is beyond my comprehension, and altogether contrary to the views I have formed of the conditions as to advances under the Land Purchase Acts. I put the case in Mr. Ronan's own words. To my mind, it is a simple case. It comes back to this—is the £20 in Halloran's case part of the purchase-money of the holding?

On the minute of the Estates Commissioners, I hold the amount is not, and cannot be considered, part of the purchase-money within the meaning of the Land Purchase Acts. The transaction resolves itself into this—that the vendor and the purchaser agreed, not merely that the tenant should purchase the holding, but that the landlord should advance in some shape or form, at the cost of the State, a sum of money for the benefit of the purchaser of the holding. The whole arrangement appears to me to conflict directly with my decision in *Wills-Sandford Estate* (1). For, if this transaction could be carried out, it is perfectly plain that all a landlord and tenant, in cases of direct sales, would have to do would be to enter into an agreement that the landlord should advance a sum to be included in the purchase-money, which would be re-payable by a purchase annuity, and the last state would be worse than the first, because the State, having to advance the money, would also have to pay 12 per cent. on the transaction. On all the facts of the case I feel bound to decide that, in technical language, the contemplated transaction amounts to a fraud upon the statute. I need scarcely say that I use the term in no offensive sense. I think I should answer the question in this way—that the entire of the said sum of purchase-money cannot be advanced, but that the balance, after deducting the sums advanced or agreed to be advanced and expended by the tenants, can be advanced for purchase of the holdings, if applied for.

Solicitors for the vendor: *Creagh & Byrne.*
Solicitor for the purchasing tenants: *J. R. Murphy.*
Solicitor for the Treasury: *William M. Lane.*

J. E. W.

(1) [1905] 1 I. R. 597.

COPPINGER *v.* SHEEHAN.

(1905. No. 390.)

Barton, J.
1906.
April 27, 28, 30.
May 1, 2, 17.

Seashore—Lands bounded by foreshore—Space between high and low water—Owner's right of access to sea across such space—Private right—Right of navigation—Obstruction thereto—Injunction.

An owner of lands bounded by the sea has a private right of access thereto for the purpose of navigation. Such right is not limited to the period of the day when the sea is in contact with his lands, but includes a private right of access to the sea across the portion of the foreshore left bare by the receding tide. An improper obstruction of such owner's right to use the foreshore for the purposes of navigation will be restrained by injunction.

TRIAL OF ACTION.

The plaintiff was the tenant and occupier of certain lands at Rossmore, in the county of Cork, which were in part bounded by the seashore. At high tide the water was for a short time in contact with the boundary of plaintiff's land.

The plaintiff claimed, in respect to this tenancy and occupation, to be entitled to enjoy uninterrupted access to the sea over all parts of the foreshore adjoining his lands, for the purpose of navigation, and to be entitled, as of right, to enjoy the use of the shore for the anchorage, mooring, or drawing up or launching of boats, barges, and other vessels, and of conveying same between the sea and his lands.

The plaintiff alleged that the defendant, in the year 1905, maliciously and without just excuse deposited upon the shore intervening between his lands and the tideway heaps of large, rough stones, thereby obstructing the access of the plaintiff to the tideway for the purposes above mentioned, and that such stones constituted a dangerous nuisance to the plaintiff in his user and enjoyment of the strand, as aforesaid. The plaintiff further alleged that when he removed and scattered these heaps of stones, the defendant placed other heaps of stones, in spite of plaintiff's protest.

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The judgment of Barton, J., contains a sufficient statement of the facts proved at the trial.

The plaintiff claimed an injunction, to restrain the defendant from placing on the shore adjoining plaintiff's land stones or heaps of material of any kind, so as to obstruct or hinder him in his use and enjoyment of the shore, as aforesaid.

The principal defence was a denial of any private right in the plaintiff to use the foreshore, when uncovered by the tide, for the purpose of access to the sea, the contention being that his private right only existed while the sea was in contact with plaintiff's lands, and that when it ceased to be in contact with his lands plaintiff had no greater right to use the foreshore than any other member of the public, and could maintain no action for obstruction thereto without proof of special damage.

There was also a counterclaim in respect of an interference with an alleged right of gathering seaweed upon another portion of the shore. It was held at the trial that the evidence negatived any such right, and judgment was given against the counterclaim.

Matthew J. Bourke, K.C., and *A. M. Sullivan*, for the plaintiff:—

An owner of land adjoining the sea has a right of access or egress over the shore at low water for the purposes of navigation and fishing, and such a right is a private one: *Attorney-General of the Straits Settlements* v. *Wemyss* (1); *Hindson* v. *Ashby* (2); see also Coulston and Forbes on the Law relating to Waters, pp. 40, 41, 94, 95, 97, 98. An injunction is the proper remedy: *Buccleuch* v. *Metropolitan Board of Works* (3); *Board of Works* v. *M'Carthy* (4); *M'Cartney* v. *Londonderry and Lough Swilly Railway Co.* (5).

D. B. Sullivan, K.C., and *Timothy Sullivan*, for the defendant:—

All subjects of the Crown have a public right to use the foreshore for navigation and fishing. Here the plaintiff's right is

(1) 13 App. Cas. 192.
(2) [1896] 2 Ch. 1.
(3) L. R. 5 H. L. 418.
(4) L. R. 7 H. L. 243.
(5) [1904] A. C. 301.

precisely the same, and is accordingly merely a public right. To constitute a private right the plaintiff must have the exclusive right of stepping from his private property on to the highway, *i.e.* at the point of contact where the sea is coterminous with his private property. In the present case, at low water the plaintiff is cut off from such access, and has no private right of stepping on to the highway over the space between high- and low-water mark. Where there is immediate and direct access there is a private right, but not otherwise: *Lyon* v. *Fishmongers' Company* (1); *Attorney-General* v. *Conservators of the River Thames* (2); *Chaplin* v. *Mayor of the City of Westminster* (3); *Brinckman* v. *Matley* (4); *North Shore Railway Co.* v. *Pion* (5). In *The Attorney-General of the Straits Settlements* v. *Wemyss* (6) the obstruction was not on the foreshore, but upon the immediate point of contact between complainant's land and the sea.

A. M. Sullivan, in reply:—

The right of an owner to have access to the sea over the foreshore where the sea adjoins his land is practically decided in *The Attorney-General of the Straits Settlements* v. *Wemyss* (6), and that view has been adopted and approved of in *Mellor* v. *Walmesley* (7).

BARTON, J.:— May 17.

The plaintiff is in possession of the lands of Rossmore, situate on the shore of Queenstown harbour, which have been held for generations in his family, formerly under a lease for lives renewable for ever, and in recent years under a judicial tenancy. These lands are bounded by "the sea." In other words, the line of medium high tide between springs and neaps forms the boundary or line of demarcation between the plaintiff's lands and the foreshore, which at this place belongs to the Crown. The water does not remain long at high-water mark, but for a certain part of every day it is in contact with plaintiff's boundary. This action

(1) 1 App. Cas. 662.
(2) 1 Hem. & Mill. 1.
(3) [1901] 2 Ch. 329.
(4) [1904] 2 Ch. 313.
(5) 14 App. Cas. 612.
(6) 13 App. Cas. 192.
(7) [1905] 2 Ch. 164.

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is concerned with a part of the foreshore extending for about 250 yards along a field called the Lawn Field, and consisting of a riband of shingly strand, averaging 60 to 70 feet in width, beyond which is slob or mud. The place has been used by the plaintiff and his predecessors in title for purposes of navigation. In former years manures and other materials were from time to time brought to plaintiff's land by sea in lighters from Cork, and landed at this part of the shore, beside the Lawn Field. The plaintiff's regular anchorage or mooring-place for yachts or boats was at another place, called Brick Island; but boats were often pulled up and down at the Lawn Field, and embarkation and disembarkation frequently took place there. There is at this spot a mooring-post for boats on plaintiff's lands, about 30 yards from a ladies' bathing-place; and this portion of the strand is usually kept clear of stones for the purposes of boating and bathing.

The defendant is tenant of some neighbouring lands. He and plaintiff have not been on very friendly terms. On January 23rd, 1905, there was a difference between them about the trespass of sheep. Defendant used an angry threat, to the effect that he would spoil the bathing. On the following day he deposited more than 40 loads of stones, in heaps about 2 feet high, on the strand, at the spot where the mooring-post and bathing-place were. In spite of plaintiff's protests, they remained there for about three months in heaps, except in so far as they were scattered by the tide. Afterwards they were spread over the foreshore. This heaping and spreading of stones on the foreshore prevents a boat being kept at the mooring-post, or being pulled up or down, or being used either for embarking or disembarking at this place. In short, it has the effect of preventing access to and from plaintiff's land to the sea across the foreshore for the purpose of navigation.

Mr. Sullivan, K.C., in a singularly clear and persuasive argument, has contended that plaintiff has no right over the foreshore greater than that of any other member of the public, and that his private right of access to the sea exists only when the sea is in contact with his lands. If plaintiff's right of access across the foreshore is no better than that of any other member of the public, he cannot maintain this action because he has not proved any

special damage. Accordingly, the case mainly turns upon the question whether the owner of lands bounded by the sea has a private right of access to the sea, different from that of the public, across the foreshore when the tide is out.

The private right of the owner of land, bounded by a public navigable river or by the sea, to have access to and from the river or sea so long as the water is in contact with his land, is not disputed. It stands on the same footing as the right of the owner of a house in a street or other highway to step backward and forward between his house and the highway. This right is recognised in many cases, of which *Lyon* v. *Fishmongers' Company* (1) is a leading example. It extends to pulling up and pushing down boats: *per* Lindley, L.J., in *Hindson* v. *Ashby* (2). The question whether the same right of access exists over the bare foreshore when the tide is out has not been the subject of much direct discussion in the reported cases. In the present case the existence of such a right has been directly challenged. Accordingly, it becomes necessary to refer to some of the decisions as to the water-rights of riparian owners, and to several judicial pronouncements of high authority, which seem to recognize the existence of a right of that kind.

In *Reg.* v. *Rynd* (3) the boundary of lands adjoining the sea was a wall, upon which the ordinary tides rose to a height of 4 feet at high water. The ebbing tide uncovered a slob foreshore to a distance of 700 yards. The owner of these lands was held entitled to have his claim for compensation or accommodation works considered by an arbitrator under the Lands Clauses Acts, when it was proposed by a railway company to erect an embankment on this slob foreshore, which, when the tide was out, divided his lands from the sea. Lord FitzGerald (then FitzGerald, J.), at p. 49, made some observations, which, as the subject-matter was the foreshore, have some bearing upon the present case. He observed that, in respect of the following injuries, "namely, what may be described shortly as cutting off the prosecutor's access to the sea from the land for bathing and boating and other lawful purposes, and for preventing his using the sea as a highway, an

(1) 1 App. Cas. 662. (2) [1896] 2 Ch. 1, at p. 9. (3) 16 Ir. C. L. R. 29, 47.

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action would have been sustainable at Common Law, not in respect of any public right, but for interference by the Company with the prosecutor's peculiar and private right to get from his own land to the sea for those lawful and legitimate purposes."

In *The Duke of Buccleuch* v. *Metropolitan Board of Works* (1) it appeared that the Duke, as occupier of Montague House, enjoyed access to the Thames at high water by a door, and at low water by a paved causeway which ran out into the river to low-water mark, across the uncovered shore of the river. The House of Lords seem to have recognized the Duke's right of access to the river along the whole of his frontage, not only at high water, but also at low water, and to have treated the causeway across the shore of the river as a particular and convenient way of enjoying such right of access when the tide receded. In particular, reference may be made to the statement of the facts of the case at pp. 419, &c., and to Lord Cairns's speech, at p. 463.

In *Lyon* v. *Fishmongers' Company* (2) there is a passage in Lord Selborne's speech which bears upon the present case. At p. 683 he said: "It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream; but it is in such contact for a great part of every day, in the ordinary and regular course of nature, which is amply sufficient foundation for a natural riparian right."

In *The Attorney-General of the Straits Settlements* v. *Wemyss* (3) one of the questions for decision was whether the action of the Government in executing reclamation and other works on the foreshore between Wemyss's land and the sea constituted an actionable wrong, entitling Wemyss to damages. Lord Hobhouse (in delivering the judgment of a board which included Lord Watson, Lord FitzGerald, Lord Macnaghten, and Sir Barnes Peacock) said (at p. 196):—"First, it was contended that his right to use the foreshore as an access to the sea was no greater than the right of any other of the public, and that it gave him no ground of action. To this it was answered that, with respect to riparian owners in tidal rivers, the contrary rule was laid down in

(1) L. R. 5 H. L. 418. (2) 1 App. Cas. 662. (3) 13 App. Cas. 192.

Lyon v. *Fishmongers' Company* (1), and that for this purpose no distinction can be taken between a tidal river and the sea. Both the Courts below were of this opinion, and their Lordships concur in it. Indeed, it was not seriously combated at this Bar on the part of the Government."

In *Mellor* v. *Walmesley* (2) the principal subject-matter of the action was a strip of land between plaintiff's land and the foreshore. In the Court of Appeal, Vaughan-Williams and Stirling, L.JJ., held that, in the circumstances of the case, the defendant was estopped from preventing the plaintiff having access to the sea over this strip, as if it had been foreshore. Stirling, L.J. (at p. 180), referred to *Wemyss's Case* (3), and said of it—"What was held both in the Colonial Courts and by the Privy Council in that case was that the lessee had, as such, a right to use the foreshore and the accretion to it for access to the sea." Then (at p. 181) he said:—"I think, therefore, that relief ought to be given on the basis of the decision in *The Attorney-General of the Straits Settlements* v. *Wemyss* (3), which I understand to mean that the plaintiffs, respectively, are entitled to free and unrestricted access to the sea from any part of the strip of land in question."

In view of these authorities and judicial pronouncements I take it to be the law that the private right of access to the sea of the owner of lands bounded by a tidal river, or by the sea, is not limited to that portion of the twenty-four hours when the water is in contact with his land. When the tide recedes and leaves the foreshore bare, he has a private right of access to the sea across the foreshore which is different from the rights of the public. In the present case this private right of access is only claimed for the purposes of navigation, *e.g.* pulling up and pushing down boats, embarking and disembarking; and I am not asked to consider whether, and, if so, how far, it is exercisable for other purposes.

I quite agree with Mr. Sullivan, that this Court will not grant an injunction for every trivial invasion of the right with which this case is concerned. But having regard to the previous threat, and to the circumstances under which this obstruction was placed

(1) 1 App. Cas. 662. (2) [1905] 2 Ch. 164. (3) 13 App. Cas. 192.

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on the foreshore, and in view of the direct manner in which plaintiff's private right of access across the foreshore has been challenged by the defendant, I cannot say that this is a case in which an injunction has been unreasonably or unnecessarily invoked.

Solicitors for the plaintiff: *Hanrahan & Co.*
Solicitor for the defendant: *Maurice Healy.*

J. MAC M.

M. R. 1906. eb. 13.

IN THE MATTER OF THE TRUSTS OF THE SETTLEMENT, DATED SEPTEMBER 25TH, 1878, ENTERED INTO UPON THE MARRIAGE OF THE REV. RICHARD CARMICHAEL HALLOWES AND MARY ELIZABETH HALLOWES, OTHERWISE COLLIS, HIS WIFE; AND IN THE MATTER OF THE TRUSTEE ACT, 1893, SECT. 44.

(1906. No. 117.)

Practice—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 44—*R. S. C., Ir.*, 1905, *Order LXXVII., R.* 3—*Power to sanction sale of land and minerals separately—Form of order.*

The trustees of a settlement, having power of sale with the consent of the tenant for life and her husband, agreed to sell the minerals under part of the settled land, apart from the land, to a tenant who held the minerals under a lease, and applied to the Court on motion, under sect. 44 of the Trustee Act, 1893, to sanction the sale:—

The Court made an order in the terms of the section, without entering into the question whether the sale was a beneficial one.

MOTION.

This was an application on behalf of Richard Collis Hallowes and Keith Robert Collis Hallowes, trustees for sale under a settlement dated September 25th, 1878, and entered into upon the marriage of the Rev. Richard Carmichael Hallowes and Mary Elizabeth Hallowes, otherwise Collis, his wife, for an order that the said trustees might be at liberty to sell to Benjamin Newgass, of

7, Lothbury, in the city of London, all the mines and mineral substances specified in a certain agreement for sale, dated October 18th, 1905, made between the said Richard Collis Hallowes and Keith Robert Collis Hallowes, as trustees for sale under the said settlement, of the first part, the said Rev. Richard Carmichael Hallowes and Mary Elizabeth Hallowes, his wife, of the second part, the said Mary Elizabeth Hallowes of the third part, and the said Benjamin Newgass of the fourth part, in, under, or upon the lands of Ballygahan Upper, Castlemacadam, Tildahinch, and Kilqueany, situate in the barony of Arklow and county of Wicklow, separately from such lands.

The facts of the case were as follows :—By the above-mentioned settlement the trustees therein named were authorised to invest all or any part of the trust moneys in the purchase of freehold lands in Ireland, such lands to be held by the said trustees upon trust upon the request in writing of the said Richard Carmichael Hallowes and Mary Elizabeth Collis during their lives to sell the same lands either together or in parcels, either by public auction or by private contract.

In exercise of this authority the said trustees purchased certain lands in the county of Wicklow, which were conveyed to them by indenture, dated April 26th, 1880, made between Right Hon. Mervyn Edward Viscount Powerscourt of the one part, and Thomas Ryan and Keith Hamilton Hallowes, the then trustees of the said settlement, of the other part.

By indenture dated November 30th, 1903, the said Richard Collis Hallowes and Keith Robert Collis Hallowes were appointed trustees of the said settlement, and by indenture dated November 30th, 1903, endorsed upon the said conveyance of April 25th, 1880, the lands described in the said conveyance were conveyed to the said Richard Collis Hallowes and Keith Robert Collis Hallowes.

By agreement, dated October 18th, 1905, made between the said Richard Collis Hallowes and Keith Robert Collis Hallowes, as trustees for sale under the said settlement, of the first part, the said Rev. Richard Carmichael Hallowes and Mary Elizabeth Hallowes, his wife, of the second part, the said Mary Elizabeth Hallowes of the third part, and Benjamin Newgass, of 7, Lothbury, in the

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city of London, merchant, of the fourth part, the said trustees at the request of the said Richard Carmichael Hallowes, and Mary Elizabeth Hallowes, and also by the direction of the said Mary Elizabeth Hallowes, tenant for life under the settlement of the lands thereinafter mentioned, agreed to sell to the said Benjamin Newgass at the price therein named, the fee-simple and inheritance free from incumbrances of and in the premises thereinafter described, being portion of the property comprised in the hereinbefore mentioned conveyance of April 26th, 1880, namely, the townland of Ballygahan, containing 82A. 2R. 28P. statute measure, or thereabouts, including the saw-mill, buildings, and fittings, and water-courses, part of the townland of Ballygahan Upper, containing 21A. 3R. 27P. like measure, or thereabouts, and a narrow strip of land therein described, being part of the lands of Tinnahinch, together with all mines, copper, copper ores, lead, lead ores, tin, tin ores, sulphur, calamine, slate, stone, coal and clay, ochres, and all other metal, minerals, mineral substances, or other precious or useful earths in, under, or upon the said lands of Ballygahan herein so agreed to be sold, as also in, under, and upon the lands of Ballygahan Upper, Castlemacadam, Tinnahinch, and Kilgreany, all situate in the barony of Arklow and county of Wicklow (being the residue of the premises comprised in the beforementioned conveyance of April 20th, 1880). The mines and minerals had been let to Benjamin Newgass apart from the lands.

Section 44 of the Trustee Act, 1893, provides that :—

"(1) Where a trustee is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incident to the working, getting, or carrying away of the minerals, or so disposing of the minerals with or without the said rights and powers separately from the residue of the land.

"(2) Any such trustee, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust, or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

"(3) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise."

Jellett, K.C., in support of the application :—

The jurisdiction given by this section of the Trustee Act, 1893, was formerly conferred by 25 & 26 Vict. c. 108, s. 2, repealed by that Act.

In *Re Wynn's Devised Estates* (1) Malins, V.-C., made an order under the earlier Act on the petition of the tenant for life, and the trustees, although no contract had been entered into for sale or exchange, and without serving the persons entitled in remainder. In *Re Pryses' Estates* (2), there cited, the same Judge had held that service of the petition on the remainder-man was not necessary.

Order LXXVII., R. 3, provides that an application under section 44 of the Trustee Act may be made by the trustees authorised to dispose of the land as in the said section mentioned. The section does not prescribe any particular mode of application, but Rule 2 of the same order provides that all applications under the Trustee Act may be made by motion except as otherwise provided by the Rules of the Order.

The trustees are willing that there should be an inquiry whether the sale would be a beneficial one, if the Court so requires.

THE MASTER OF THE ROLLS :—

I am not disposed to mix myself up with an inquiry, as it might be said afterwards that I had exonerated the trustees from responsibility in the matter. I think, that having regard to the authorities cited, the trustees merely get the sanction of the Court to act, and must act with prudence, and on their own responsibility. I will make the order asked for.

(1) 28 L. T. (N. S.) 613. (2) L. R. 10 Eq. 531.

M. R. 1906.

In re HALLOWES' TRUSTS.

The order was as follows :—

"UPON motion this day made to this Court by counsel for Richard Collis Hallowes and Keith Robert Collis Hallowes, trustees for sale under the settlement in the title hereof mentioned, pursuant to originating notice of motion, dated the 1st day of February, inst., on reading the said notice, the affidavit of Keith Robert Collis Hallowes, filed on the 1st day of February, inst., and the documents therein referred to, and on hearing what was alleged by said counsel: The Court doth order that Richard Collis Hallowes and Keith Robert Collis Hallowes, or the survivor of them, or other the trustees or trustee of the said settlement, be at liberty to exercise the power of sale and other powers and authorities contained in the said settlement, so as to dispose of the mines and minerals and mineral substances in and under the messuages, lands, and hereditaments now subject to the trusts of the said settlement, with or without rights and powers of and incidental to the working, getting, and carrying away, of such mines and minerals and mineral substances separately from the residue of such messuages, lands, and hereditaments, without prejudice to any future exercise of the said powers and authorities with respect to the undisposed-of land."

Solicitors for the applicants: *Hallowes & Hamilton.*

W. L.

IN RE KENNY'S TRUSTS.

M. R.
1906.
March 12, 19.

Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 26, 35—*Jurisdiction—Appointment of new trustees—Existing trustees—Vesting order.*

The jurisdiction of the Court to make a vesting order under sections 26 and 35 of the Trustee Act, 1893, embraces a case where the trustees in whom the property is to be vested have been already appointed.

UNDER the provisions of a marriage settlement, dated 19th April, 1887, a sum of £2330 3*s*. Government stock was transferred to and vested in R. Delany and J. H. Menton, as trustees. R. Delany died in 1888, and Mark Delany was appointed a trustee of the settlement in his place. In 1890 Mark Delany retired from the trusts of the settlement, and transferred the trust funds to J. H. Menton and A. Dowling, which were vested in them as trustees of the settlement of 1887, but no deed of appointment of Dowling as a new trustee on the retirement of Delany was executed. Delany died in 1902, and Menton in 1905. Dowling was adjudicated a bankrupt in April, 1904, and left Ireland, and his address could not be ascertained.

By indenture of 26th February, 1906, indorsed on the settlement of 1887, Mrs. Annie Kenny, who was tenant for life, and having the power of appointing new trustees under the settlement, duly appointed Denning and Kirwan as trustees thereof. The trust property was represented by mortgages and railway stock.

An originating summons was taken out by Mrs. Kenny, for an order vesting the property, subject to the trusts of the settlement of 1887, in Denning and Kirwan, who had been appointed new trustees of the settlement.

Pigot, for the applicant :—

We are entitled to the order asked for. The Court will not appoint new trustees merely to give jurisdiction for vesting : *In re Dewhirst's Trusts* (1). In *Blaine's Trusts* (2), where one of the

(1) 33 Ch. D. 416. (2) W. N., 1886, p. 203.

M. R. 1906.

In re KENNY'S TRUSTS.

trustees was out of the jurisdiction, and a new trustee had been appointed in his place by deed, the Court made an order vesting the right to transfer the stock in the continuing trustee and the new trustee. *In re Cane's Trusts* (1) is distinguishable from the present case, because here there is an existing trustee. The word "and" in clause 1 of sect. 26 cannot govern "jurisdiction" in clause 2 (b), because, if so, all the elements in clauses 1-6 must coincide to give the Court jurisdiction, *quod est absurdum*. In both sections the proviso (*a*) at end of each shows that there must be a jurisdiction to vest in some cases where the Court does not appoint. *Dewhirst's Trusts* (2) was decided on the 34th section of the Trustee Act of 1850 (13 & 14 Vict. c. 60), which, like the 35th section, makes the jurisdiction clearly dependent on the prior appointment of trustees by the Court. But the provisions of the 26th and 35th sections of the Act of 1893 are different.

The assignees in bankruptcy of Dowling were served with notice of the application.

March 19.

THE MASTER OF THE ROLLS held that Dowling was a trustee within the meaning of sections 26 and 35 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), and that the Court had jurisdiction, under these sections, to make an order vesting the property in the trustees already duly appointed by deed of 26th February, 1906, and, accordingly, granted the application.

Solicitors for the applicant: *Hoey & Denning.*

R. W. L.

(1) [1895] 1 I. R. 172. (2) 33 Ch. D. 416.

IN THE MATTER OF THE ESTATE OF GEORGE WILSON.

Meredith, J.
1906.
July 3, 6.

Yearly jointure rentcharge—Fixed days of payment—First gale payable on gale-day which should next come after the happening of a certain event—Apportionment.

Where, under a settlement, the first gale of a yearly jointure rentcharge of fixed amount, payable by two equal half-yearly payments on certain days in each year during the life of the jointress, was directed to be paid on the gale-day which should first come after the happening of a certain event:—

Held, that on the first gale-day the jointress was only entitled to an apportioned part of such first gale as from the date of the happening of the event.

QUESTION OF LAW submitted by the Examiner for the opinion of the Judicial Commissioner.

From the memorandum of the Examiner the following facts appeared:—Prior to the execution of the indenture next hereinafter mentioned, Sarah Brenane was entitled as tenant for life to, and Henry Hearn Molyneux was owner in fee-simple, subject to the said life estate, of the hereditaments and premises therein comprised, including a fee-farm rent which had been apportioned and redeemed in this matter, and in relation to which the question now submitted arose.

By indenture of settlement dated 3rd February, 1863, and made between Sarah Brenane of the first part, Henry Hearn Molyneux of the second part, Agnes Keogh of the third part, the Rev. Edward Keogh and the Rev. Nicholas Cantwell of the fourth part, and Philip Keogh and the Very Rev. Edward Hearn of the fifth part, being a settlement executed in contemplation of the marriage of the said Henry Hearn Molyneux with the said Agnes Keogh (which was shortly afterwards solemnized), the hereditaments and premises therein comprised were, for the considerations therein named, granted, conveyed, and assigned unto the said Edward Keogh and Nicholas Cantwell and their heirs to the uses, and upon the trusts therein declared, and (*inter alia*), "after the solemnization of the said intended marriage, to the use

Meredith, J. 1906. In re WILSON'S ESTATE.

of the said Edward Keogh and Nicholas Cantwell, their heirs and assigns, from and after the death of the said Henry Hearn Molyneux, in case the said Agnes Keogh shall survive him, to pay, out of the rents, issues, and profits thereof, to the said Agnes Keogh and her assigns, for and during her natural life, and without power of anticipation, the yearly rentcharge or sum of £300, to be paid and payable by two even and equal half-yearly payments on every 1st day of May and 1st day of November in each year: the first half-yearly payment thereof to be made and payable upon whichever of the said gale-days that shall first come after the happening of the aforesaid event, the sole and separate receipt of the said Agnes Keogh to be a complete and only discharge for each gale thereof: Provided always that when and so often as any gale of said annuity or yearly rentcharge shall be in arrear and unpaid for the space of thirty-one days from the respective days herein named for payment thereof, it shall be lawful for the said Edward Keogh and Nicholas Cantwell, their heirs and assigns, and for the said Agnes Keogh, at her discretion, and in her own name, or in the name of the said Edward Keogh and Nicholas Cantwell, or their heirs, to have resort to all such remedies by way of distress and entry for recovery thereof as are usually given in leases between landlord and tenant: And it is hereby declared and agreed upon by and between the said parties to these presents that the said annual sum of £300 is intended to be, and the said Agnes Keogh doth hereby accept the same, for her jointure, and in lieu and bar of all the dower or thirds which by Common Law or by custom or otherwise she, the said Agnes Keogh, might otherwise be entitled to, into, from, or out of any hereditaments of which he, the said Henry Hearn Molyneux, shall or may at any time or times during the said intended coverture be seized of, or otherwise entitled to for an estate of inheritance": and subject thereto, to the uses and upon the trusts therein declared.

The said Henry Hearn Molyneux died on 16th March, 1906, leaving the said Agnes Molyneux (otherwise Keogh) him surviving. The said Agnes Molyneux claimed to be entitled to a full half-year's gale of the said jointure on the 1st of May, being the first gale-day next ensuing.

The following question was submitted:—Did Mrs. Molyneux become entitled on the 1st May, 1906, under the settlement of the 3rd February, 1863, to a full half-year's jointure, or only to a proportionate part from the said 16th March, 1906?

O'Connor, K.C., for Mrs. Molyneux.

Herbert Wilson, K.C., for certain mortgagees who were next interested, subject to the jointure:—

Mrs. Molyneux is only entitled to an apportioned part of the gale due on 1st May, as from 16th March, 1906. Otherwise during the first year, calculated from that date, she would be receiving a jointure at a rate greater than £300 per annum: *Williams* v. *Wilson* (1).

Cur. adv. vult.

July 6.

MEREDITH, J.:—

I bear in mind that full dominion over the property was in the parties to the settlement at the time of its execution. They had power to create such a jointure as they thought right, and to make it payable at such time as they thought fit. The question is one of construction of the clause in the settlement creating the jointure, and the provisions it contains with regard to the payment of it. The clause I refer to directs: "From and after the death of the said Henry Hearn Molyneux, in case the said Agnes Keogh shall survive him, to pay, out of the rents, issues, and profits thereof, to the said Agnes Keogh and her assigns, for and during her natural life, and without power of anticipation, the yearly rentcharge or sum of £300, to be paid and payable by two even and equal half-yearly payments on every 1st day of May and 1st day of November in each year: the first half-yearly payment thereof to be made and payable upon whichever of the said gale-days that shall first come after the happening of the aforesaid event, the sole and separate receipt of the said Agnes Keogh to be a complete and only discharge for each gale thereof." Then follows a proviso that if any gale of the rentcharge shall be in arrear for thirty-one days, the remedies by way

(1) 5 New Rep. 267.

Meredith, J. 1906.

In re WILSON'S ESTATE.

of distress and entry that are usually given in leases between landlord and tenant may be resorted to.

Now, if this were the case of a lease, dated in September, reserving a full year's rent in October, with the usual proviso for distress and re-entry, there is ample authority for the proposition that distress could be made for the full year's rent due in October.

This is the case of a jointure. It is expressed to be in lieu and bar of dower. In my opinion, the first portion of the clause creating the jointure is the dominant portion. In it is to be found the intention of the parties. It is clear that what the parties intended was to provide a jointure of £300 per annum for this lady *during her life*. If the interpretation sought to be put upon this clause by Mr. O'Connor were to be adopted, it is possible that the lady might receive a jointure of more than £300 per annum *during her life*.

I must endeavour to carry out the clear intention of the parties. I think the case of *Williams* v. *Wilson* (1) applies to this case. I see no distinction between an annuity for twenty-one years and one for the life of the annuitant. In each case the time limit is fixed. In this case the dominant intention of the parties was that neither more nor less than £300 per annum, measured by the life of the jointress, was to be paid. The only way to secure that this intention shall be carried out is by holding that the first gale can be apportioned as from the death of Henry Hearn Molyneux, and that the jointress is entitled to receive the apportioned part up to the first gale-day.

In *Sutton* v. *Ennis* (2) the question of a jointure rentcharge terminating with the life of the jointress was considered. In that case the deed provided that the jointress, "if she should happen to survive the said James Halpin Rorke, her intended husband, should and might have, receive, and take out of the said granted premises one annuity or yearly sum of £320 during the term of her natural life for her jointure, and in full satisfaction, lieu, and bar of all dower and thirds . . . ; the said annuity or yearly sum of £320 to be paid unto the said Rose Sutton and her assigns by two even and equal half-yearly payments in each and every year,

(1) 5 New Rep. 267. (2) I. R. 4 Eq. 325.

above taxes: the first half-yearly payment thereof to be made on the expiration of the first half-year after the decease of the said James Halpin Rorke." Rose Sutton died between the gale-days; and the question arose whether the jointure was apportionable under 4 & 5 Wm. 4, c. 22. The Master of the Rolls, in a judgment which well repays reading, decided that the jointure was apportionable, even though the jointure ceased with the death of the jointress. This is an authority that a jointure is apportionable in the case of the death of a jointress between the gale-days.

I have looked into Vaizey on Settlements, and the authorities cited there, including *Purcell* v. *Purcell* (1), which was the case of the creation of a jointure under a power, with no limit as to amount within the value of the property. The Lord Chancellor (Sir Edward Sugden) held that where there is a power to create a jointure, unlimited as to amount, the power may be validly exercised by the donee of the power directing the first payment to be made on the day of his own death, and that, although it was not, perhaps, a natural construction of such a power to say that the jointure might be made payable *instanter* upon the death of the donee, yet that in the case before him, this result might have been indirectly effected, for the appointee, the jointress, having lived beyond the first regular day of payment, there was nothing to have prevented the party from appointing that on the first regular day of payment she should receive double the sum to which she was to be entitled on every subsequent day. That case differs from the present case, where the amount of the jointure is limited.

Dealing with the case of instruments whereby rents are reserved, in Vaizey on Settlements (ed. 1887, at p. 934) it is stated —"The rent created is usually a yearly one, but it is necessary that the times for payment should be prescribed, and in most cases it is made payable quarterly, or by quarterly or equal quarterly payments. This is not inconsistent with the description of the rent as a yearly one. Previously to the passing of the Apportionment Act, 1870, it was usual either to preface the direction that the rent should be paid half-yearly or quarterly, as

(1) 2 Dru. & War. 217.

Meredith, J. 1906.

In re Wilson's Estate.

the case might be, with a statement that it should be considered as accruing from day to day, or, according to an older practice, to add to the clause creating the rent another making a proportionate part payable in respect of any interval which might happen between the day of payment last preceding the day when the rent determined and that day. Since the Act of 1870 neither of these devices has been needed. It also appears to make the phrase 'payable by quarterly' more apt than 'by equal quarterly' payments, because the final payment will not be equal to the preceding ones, unless the day when it should be made should also happen to be that on which the rentcharge determines."

In the present case, both on principle and authority, the only way to carry out the intention of the parties is to apply the provisions of the Apportionment Act to the first gale payable in respect of the jointure. I, accordingly, answer the question—Did Mrs. Molyneux become entitled on 1st May, 1906, under the settlement of 3rd February, 1863, to a full half-year's jointure, or only to a proportionate part from the 16th March, 1906?—by saying: Only to an apportioned part.

Solicitors for Mrs. Molyneux: *O'Keeffe & Lynch.*
Solicitors for the mortgagees: *D. & T. Fitzgerald.*

J. E. W.

CUSSEN *v.* HYNES (1).

Appeal.
1906.
June 18, 26.

Charity—Gift to Monastic Orders—Legacy to Superior of Order—Void bequest—10 Geo. 4, c. 7, ss. 28, 34.

Bequest to the Superior of the R. Convent, county of Cork, of a sum of £300 for the education of a priest for that community.

Bequest to the Superior, Holy Trinity Church, Charlotte-quay, Cork, of a sum of £100 for that community.

Evidence was given to show that the convent and the church both belonged to the Franciscan Order:—

Held (reversing the decision of Barton, J.), that both bequests were void.

SUMMONS for determination by the Court as to whether the two following bequests contained in the will of Catherine Cleary, dated the 31st August, 1901, were valid or not:—

"I bequeath to the Superior, Rochestown Convent, county Cork, the sum of £300 for the education of a priest for that community."

"To the Superior, Holy Trinity Church, Charlotte-quay, Cork, the sum of £100 for that community."

It appeared from the affidavit of Ellen Cussen, the plaintiff, who was residuary legatee under the will, that the Rochestown Convent and Holy Trinity Church, Charlotte-quay, Cork, were Capuchin convents or monasteries, and the communities of both were composed of priests of that branch of the Franciscan Order of Roman Catholic priests engaged in the education of priests of that Order, or in advancing the general purposes of the said Franciscan Order in Ireland; both said Capuchin branches of the Franciscan Order were Communities of Roman Catholic priests bound by monastic vows.

An affidavit was made by the Rev. T. J. Hynes, one of the defendants, the guardian and Superior of the Rochestown Convent, in which he stated that there was a school at Rochestown under his charge for the education of priests for the home and foreign

(1) Before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

CUSSEN v. HYNES.

missions; and that it would not be permissible in the Roman Catholic Church to educate a priest for one particular place or community exclusively, and that it was not true that the bequests, if paid to him, must be devoted to purposes in Ireland.

An affidavit was made by the acting Superior of the Holy Trinity Church, Charlotte-quay, Cork, in which he stated that the Holy Trinity Church was situate in the centre of the city of Cork, and was attended by a large congregation, consisting principally of citizens of Cork who resided in the neighbourhood and surrounding districts. Religious services were conducted there daily in the presence of the congregation. The Church fulfilled in many respects towards the congregation the functions and services of a parish church. The members of the Community of the Holy Trinity Church were the priests who conducted the ceremonies in the said Church.

On the 10th May, 1906, Barton, J., delivered judgment, and held the bequests valid. From that judgment the plaintiff appealed.

Charles F. Doyle, K.C., and *Cleary*, for the appellant:—

Legacies to monastic orders are void under the Catholic Emancipation Act: *Sims* v. *Quinlan* (1); *Kehoe* v. *Wilson* (2) *Murphy* v. *Cheevers* (3); *Bradshaw* v. *Jackman* (4); 7 & 8 Vict. c. 97. The legacies cannot be held good, as having been given to the members of the Order, as the latter cannot have a legal existence. Legacies to monastic Orders would be held void under the Act against Superstitious Uses: *De Garcin* v. *Lawson* (5); *Elliott* v. *Elliott* (6).

Healy, K.C., and *Linehan*, for the respondents:—

Though a gift may be void if given to the Orders, Societies, or Communities, it may be a good gift to the individuals composing the Orders or Societies at the time: *Wilkinson's Trusts* (7); *Roche* v. *M'Dermott* (8); *Bradshaw* v. *Jackman* (4).

(1) 16 Ir. Ch. R. 43.
(2) 7 L. R. Ir. 531.
(3) 17 L. R. Ir. 205.
(4) 21 L. R. Ir. 12.
(5) 4 Ves. 433.
(6) W. N., 1891, p. 9.
(7) 19 L. R. Ir. 538
(8) [1901] 1 I. R. 394.

Appeal.
1906.

CUSSEN
v.
HYNES.

June 26.

WALKER C. :—

In this case Ellen Cussen, who is the residuary legatee in the will of Catherine Cleary, which bears date the 31st August, 1901, has, by virtue of her interest as such residuary legatee, sought the opinion of the Court upon the validity of two legacies contained in that will. Barton, J., has declared both legacies valid, and the residuary legatee has appealed.

I shall deal with each legacy separately, as different counsel have appeared for each legatee, and there are some considerations applicable to the one which do not apply to the other.

The first bequest is "To the Superior, Rochestown Convent, county Cork, the sum of £300 for the education of a priest for that community."

Ellen Cussen has given evidence as to the Rochestown Convent and the priests in it, which has not been and could not be contradicted. Turning her affidavit into the singular number, it will run: "The said Rochestown Convent is a Capuchin convent or monastery, and the community of it is composed of priests of that branch of the Franciscan Order of Roman Catholic priests engaged in the education of priests of that Order, or in advancing the several purposes of the said Franciscan Order in Ireland; said Capuchin branch of the Franciscan Order is a community of Roman Catholic priests bound by monastic vows, and the said bequests, if upheld by the Court, must be devoted to the purposes of the said Order in Ireland."

The only evidence on the other side is the affidavit of the Rev. Thomas Hynes, who describes himself as the Superior and intended legatee, and also as a Roman Catholic clergyman; and he says—"There is a school at Rochestown under his charge for the education of priests for the home and foreign missions"; and he says, "It would not be permissible in the Roman Catholic Church to educate a priest for one particular place or community exclusively; nor is it true that the bequest, if paid to him, must be devoted to purposes in Ireland." That is, reading the two affidavits together, the £300 will be devoted to the education of a priest of the Capuchin Order, who may, when he becomes a Capuchin priest, be sent on a foreign mission; and he will become, when he is educated, a member of a community of

Appeal. 1906. CUSSEN v. HYNES. Walker, C.

Roman Catholic priests bound by monastic vows—the community of Capuchins.

As such, subject to the points raised by Mr. Healy, the case is directly within the prohibition and disqualification created by the 28th and 34th sections of 10 Geo. 4, c. 7, which Act it is our duty to administer and apply so long as it remains the law of the land. And I look on the section of 7 & 8 Vict. c. 97, referred to by Mr. Doyle as a legislative declaration that a bequest or donation to or for the benefit of the community legislated against by the Catholic Emancipation Act was in 1844 illegal. It is a payment to, and advancement for the benefit of, a religious Order, Community, or Society of the Church of Rome, bound by monastic or religious vows, within the United Kingdom.

It is first said—The object is to educate priests who will be foreign missionaries, and therefore, as such, out of Ireland; but to become missionaries they must first be fully qualified and ordained Capuchin priests, and therefore so far as that point is concerned the illegal Order would be benefited.

It is then said that the legislation under the Act is only directed against religious communities of the Church of Rome, and that it is not stated here that the Capuchin priests belong to a religious community of the Church of Rome.

Mr. Hynes describes himself as a Roman Catholic clergyman and Superior of Rochestown Convent, which is not denied to be a community of Capuchin priests; and how, taking the affidavit of Ellen Cussen and his together, he is not a member of a religious community of the Church of Rome, I fail to see. Roman Catholic subjects of the King and priests of the Church of Rome are interchangeably dealt with in the Act; and ordained Roman Catholic priests belong to the Church of Rome.

The point on which Barton, J., sustained the bequest is different, and depends on the true construction of this bequest. He reads it as a bequest to the Superior in trust for the members of the community for the education of a missionary priest. I cannot adopt the object as being for a missionary priest other than an ordained Capuchin priest, who may, or may not, go on a foreign mission; and I cannot at all take the same view as the learned Judge as to the meaning of the words "that community."

I think "that community" means the community in Rochestown Convent, the Capuchin Order and priests of that Order as such, and, so understood, the gift is for the advancement of that Order, and cannot be supported.

The second bequest is really governed by the considerations which have influenced me in my conclusion as to the first. The evidence of Mrs. Cussen equally applies to it; but it is said that "community" in this bequest means the individuals, and reliance is placed on cases like *Bradshaw* v. *Jackman* (1) and *Wilkinson's Trusts* (2). Those were cases in which it was held in the case of gifts to nuns that the gifts applied to the individual sisters, and so perpetuity was avoided; but it seems to me immaterial in this case that the individual Capuchin priests might receive their shares from the Superior, because the gift is for the benefit of the aggregate of the community—a religious community bound by monastic vows. Of course, a gift may be lawfully made to the Superior in his individual capacity, or to any Capuchin priest; but when it is given to the community of which he happens to be one, and the community is the object to be benefited, it falls under the very words and policy of the Act. We must declare the gift void.

FITZ GIBBON, L.J.:—

I accept Mr. Healy's contention, that the appellant must bring the impeached bequests by strict proof within the disabling and penal provisions on which she relies; but the answer to the first argument which he founded upon that contention is that the words "Roman Catholic" and "members of the Church of Rome" are, throughout the Emancipation Act, used as convertible terms, describing the religious denomination to which the Emancipation Act applies.

The same interpretation must be given to these expressions where they are used in conferring the benefits of the Act by the enabling and enfranchising clauses, as where they occur in the disabling and penalising provisions which limit or impose conditions upon the enjoyment of those benefits. Both expressions describe the same thing—namely, that sub-division of the general body

(1) 21 L. R. Ir. 12. (2) 19 L. R. Ir. 538.

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of Christians who believe "One Catholic and Apostolic Church," which also acknowledges the authority of the Pope and accepts the decrees of the Council of Trent—in other words, the Church which professes what the Act calls "The Roman Catholic Religion." The function of these words is identification, and the same function is fulfilled with regard to other sub-denominations of the same general body by the words "the Protestant Episcopal Church of England and Ireland" (the title given to that Church by the Act of Union), and "the Protestant Presbyterian Church of Scotland," in sect. 24.

A proof of the necessity for some descriptive epithets arising from contending claims of religious exclusiveness and comprehensiveness may be found in the fact that few would recognize the body which calls itself "The Catholic and Apostolic Church" without some reference to "Irvingites," yet the members of that Church might, in Mr. Healy's words, regard that term as "a nick-name," or think it "offensive."

The affidavits indisputably prove, and both parties admit, that the community mentioned in each bequest is a "Roman Catholic" community, and consists exclusively of "members of the Church of Rome," within the meaning of the Act. The prohibitory clauses are directed against associations of Roman Catholic men, which are in successive sections called "Orders," "Communities," and "Societies," and the essential element of illegality is the existence, between the members, of a common bond of obligation in the form of monastic vows. It is proved, if not admitted, that each "superior," and every member of each community mentioned in the will, belongs to an Order or Society, which falls within the word of the statute.

It is not for me to consider the justice or expediency of any positive law; the High Court of Parliament alone can render a positive law inoperative, and no court of interpretation or of administration can treat an existing statute as obsolete, as out of date, or as a dead letter, so long as its subject-matter continues to exist.

The history of our law supplies some remarkable instances to show that the due performance by the temporal Courts of their duty to administer the law as it stands is the best way to bring

about, through Parliament, any alteration or repeal that may become politic, just, or necessary. But Judge-made law cannot annul or limit the operation either of "emancipation," or of the statutory terms on which it was granted. I must, therefore, decline to make, or to associate myself with, any remarks upon the statute which it is my duty to construe and to apply.

Having regard to the evidence as to the Capuchin Order which brings it within the statutory disability, it seems to me that the vital—indeed the only legitimate—question in the case is, whether, on the construction of her will, and according to her intention declared thereby, the object of the bounty of the testatrix, Catherine Cleary, was, in either or both of the bequests before us, "a Community" of that Order—as such? The legatee in each case was a *persona designata* under the name of a "Superior"; and the description of the beneficial purpose, or of the beneficiary, in each case ends with the words "for that Community," which, in my opinion, must mean the Community of which the legatee was the Superior. Read with the localising words, these bequests are proved to identify existing Communities of Capuchin monks.

The distinction between a "Community," as a continuing or *quasi*-corporate body, and the individual members of a Community for the time being, appears to me to become material only when the validity of a gift *otherwise valid* depends upon avoiding infringement of the rule against perpetuities. The legality of a Community as an object of bounty must always be determined, with respect to its members existing at any given time, in the same way in which it should be determined with respect to the Order, Community, or Society, regarded as a continuing institution, whether *quasi*-corporate or composed of successive individual members. The rule against perpetuities is immaterial to the question of the legality of the object of bounty, which I regard as the real question in the present case.

I assume, and I am even inclined to concede, that a Community, illegal as such, may be made the recipient of a bequest expressly devoted to a lawful purpose, which the Community is bound to carry out—on the principle that a valid and lawful trust is not to be defeated for want of a proper trustee. The respondents contend that, whether the Communities in

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question are, or are not, illegal, the functions which they perform confer public benefits which render the bequests valid as charitable dispositions.

In my opinion the contention fails as to the bequest for the education of a priest for the Rochestown Convent, for each of two reasons. First, the maintenance of a priest is intended as a benefit for the Rochestown Community as such, and is just as directly a bequest for the benefit of an illegal object as if it were given for the maintenance of the Convent itself, or for providing it with the services of any other officer, if the bequest means that the priest is to officiate for that Community. But secondly, on the evidence, I hold that, according to the proved rules of the Order, and the constitution of the Roman Catholic Church, which the testatrix must be taken to have had in her contemplation, the priest to be educated under the bequest was not necessarily to be—in fact was not to be—a permanent Chaplain of the local Community, but was intended to be educated for the priesthood, first as a postulant, and afterwards as a member of the Order. The education which the testatrix intended to provide was to be a qualification for joining the Order, and for becoming a priest through the Order. This construction equally leads to the conclusion that the benefit of the illegal Community was the real object of the bequest.

To meet this difficulty, it is said that the education of a member of the Order as a priest is a good charitable object, because, when ordained, his services for the advancement of religion would not be confined to Ireland, and in certain parts of the Empire, *e.g.*, Quebec and Malta, to which the Emancipation Act does not extend, the Order is recognised by law. But the bequest was made for education in Ireland; and the priest was to be educated for the Community at Rochestown; the Emancipation Act renders that education illegal, and I cannot accept the contention, or the decision, that a bequest for an education to be given by or for a Community in Ireland, which is prohibited by a Statute applicable to the United Kingdom, can be validated by the possibility or probability that the person who has received that education may, after completing it, perform lawful or even public services elsewhere.

The main argument in support of the second bequest for the Community of the Capuchin Church in Cork, which I hold to be, on the construction of the will, the beneficiary or *cestui que* trust of the gift, was that the Church performs for an important congregation priestly duties which, if performed by Secular Clergy, would, undoubtedly, be recognised as "charitable" services rendered for the religious edification of Roman Catholics. I find it impossible to get rid of the effect of the illegality of the object of the bequest by the character of the work done by it. The Act which makes it illegal for Regulars to be or remain in Ireland is none the less operative because they do work here which might be done by other and lawful instruments, namely, by the Secular Clergy.

For these reasons, I am unable to sustain the judgment of Barton, J., as to either of these bequests, and I think it inconsistent with the authorities which have heretofore held bequests to be void which are made, either directly to, or through a trustee for the benefit of a "Community" which falls *eo nomine* under the disabling provisions of the Emancipation Act.

The exception of Convents of nuns makes the decisions regarding them inapplicable to the present case; and the express trusts for charitable or other lawful purposes which, in many cases, have been attached to bequests to Communities of men, render those cases also inapplicable for our purpose.

It is impossible to impute to these bequests the intention or meaning of giving a personal pecuniary benefit, for their own use, to the individual members of the Communities existing at the date of the death of the testatrix, and this was the only remaining contention of the respondents.

HOLMES, L.J.:—

The Catholic Relief Act of 1829, by its 28th and following sections, after a recital that Jesuits and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom, and that it is expedient to make provision for the gradual suppression and the final prohibition of the same therein, proceeds to enact that persons doing certain specified acts which might

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have the effect of nullifying the declaration in the preamble were to be subject to severe penalties. There is no provision in this or any other statute making bequests of legacies for the benefit of such orders, communities, or societies illegal; but it has been held by decisions which bind this Court, that where a testator gives property or money for a purpose which, if carried out, would violate these enactments, such a testamentary disposition would be void. The only inference to be drawn from the judgment in *Sims* v. *Quinlan* (1) and other authorities is, that bequests which necessarily and inevitably tend to the practical result of perpetuating the society or community prohibited, and which thus violate the expressed purpose of the statute, are illegal. This principle has, I think, received statutory recognition. The Act 7 & 8 Vict. c. 97, s. 15, after authorising endowments for the maintenance of the Roman Catholic clergy and their places of worship, provides expressly that nothing therein shall render lawful any bequest or donation in favour of any religious order bound by monastic vows prohibited by the Act 10 Geo. 4, c. 7, in favour of any member or members thereof. The only inference I can draw from this enactment is that such a bequest or donation was, in 1844, illegal; and if illegal then, it is illegal still. The penalties imposed on members of monastic orders and communities by the statute of 1829 have, as far as I am aware, never been enforced. At least, I have never known such a case; and it may be an anomaly that in this state of things the statute imposing the penalties should be used to defeat the intentions of a testator. But no system of law is free from anomalies; and such defects, if they are defects, can only be corrected by legislation, and not by tribunals whose only duty is to declare the law as it exists.

In the light of these observations I shall now consider the two legacies discussed in this appeal. The first is "to the Superior, Rochestown Convent, county Cork, the sum of £300, for the education of a priest for that community." It appears from the evidence of the appellant that Rochestown Convent is a community composed of priests of the Capuchin branch of the Franciscan Order, bound by monastic vows, and engaged in the

(1) 16 Ir. Ch. R. 43.

education of persons with the view of their becoming priests of that Order, and the legacy is presumably intended for the education of one of these pupils. This statement is not contradicted by the affidavits relied on by the respondents; and the only addition made to it is that the scholars are educated for the home and foreign missions, and not for one particular place or community exclusively. Barton, J., upheld the legacy on the ground, as I understand his judgment, that there is nothing in the Act of 1829 directed against members of monastic communities leaving the realm, or against the education of a priest for missionary work outside the realm. He, however, overlooks the evidence that the scholars are educated for both home and foreign missions, and that when they join the community they may be retained in Ireland, or sent elsewhere.

Now, the statute makes it a misdemeanour for a person to become a member, or to admit others to become members, of monastic communities in the United Kingdom; and if the object of the school is to train persons for admission into the community in Ireland, it would, I think, be immaterial even if the intention is that when admitted they will be all sent abroad. According to the evidence, however, some of them will remain in this country. I am, therefore, obliged to hold that the bequest is void.

The second legacy is "to the Superior, Holy Trinity Church, Charlotte-quay, Cork," the sum of £100 for that community. It appears that this community is also composed of priests of the Capuchin branch of the Franciscan Order, bound by monastic vows. It further appears that the church belonging to the community in Cork is used by a large congregation, whose spiritual needs are attended to by the monks, and, in fact, fulfils in many respects the functions of a parish church. The members of the community are, however, not the less bound by monastic vows; and I do not think that the mode in which their Church is used, or their pious labours in the city, can affect the question under consideration. Barton, J., upheld the legacy on the ground that the gift is to be construed as given for the benefit of the persons who were members of the community at the time of the testatrix's death. In other words, that such persons were entitled to have

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the £100 divided amongst them, for their own use. He arrives at this conclusion on the authority of *Bradshaw* v. *Jackman* (1). In the present case, however, the term "community" must be construed as meaning the whole body.

There are good bequests in the will under consideration to charitable societies, such as the Inch Poor Society. Could it be argued that this is a gift for the personal benefit of the members of the society when the testator died? I think not; nor can I give such a construction to the community of Capuchin Monks.

I, therefore, hold that this bequest is also void.

Solicitor for the plaintiff: *Roger Fox.*

Solicitors for the defendants: *J. C. & A. Blake* and *Michael Murphy.*

R. D. M.

Meredith, J. 1906. June 26. July 10.

IN THE MATTER OF THE ESTATE OF SIR JAMES HENRY STRONGE, BARONET.

Land Purchase Acts—Apportionment and redemption—Fixing of redemption price—Security—Personal covenant by original grantee to pay the rent.

Where, in Land Purchase proceedings, an order has been made for the apportionment of a head-rent as between the lands sold and the other lands liable thereto, and for the redemption of the sum apportioned on the lands sold, in estimating the security for the purpose of fixing the redemption-price the Court will treat the sum to be redeemed as a separate rent issuing out of the particular lands on which it has been apportioned.

The personal covenant by the original grantee to pay the rent, if of appreciable value, is an element to be taken into consideration in fixing the redemption price.

APPLICATION for an order fixing the redemption price to be paid by the vendor to the Provost, Fellows, and Scholars of Trinity College, Dublin, in respect of the apportioned rent of £188 10*s.*, as fixed by order dated 29th November, 1904 (as amended pursuant to a subsequent order dated 17th May, 1906), on the lands sold in this matter, and arising under a grant in

(1) 21 L. R. Ir. 12.

perpetuity, dated 30th April, 1856, and made between the Provost, Fellows, and Scholars of Trinity College, Dublin, of the one part, and Sir James Matthew Stronge, Bart., of the other part, whereby the lands mentioned in the said grant were granted subject to the yearly rent of £591 6*s.* 1*d.*, variable as therein; and also for the redemption price of the reservations in the said grant of all mines, minerals, and quarries of slate or marble, and all woods and underwoods then growing, renewing, standing, or being in or upon the premises, or any part thereof, save such as had been registered pursuant to the several statutes in that case made and provided; also for an order fixing the redemption price to be paid by the vendor to the said Provost, Fellows, and Scholars of Trinity College, Dublin, in respect of the apportioned rent of £150 2*s.* 7*d.*, as fixed by order dated 29th November, 1904, on the lands sold in this matter and arising under a grant in perpetuity dated 30th April, 1856, and made between the Provost, Fellows, and Scholars of Trinity College, Dublin, of the one part, and Sir James Matthew Stronge of the other part, whereby the lands mentioned in the said grants were granted, subject to the yearly rent of £610 1*s.* 5½*d.*, variable as therein; and also for the redemption price of the reservations in the said grant of all mines, minerals, and quarries of slate or marble, and all woods or underwoods then growing, renewing, standing, or being in or upon the premises, or any part thereof, save such as had been registered pursuant to the several statutes in that case made and provided.

By grant in perpetuity dated 30th April, 1856, and made between the Provost, Fellows, and Scholars of the College of the Holy and Undivided Trinity of Queen Elizabeth, near Dublin, of the one part, and Sir James Matthew Stronge, Bart., of the other part, in pursuance of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851, certain lands therein described as "all that and those the towns and lands following—that is to say, the towns and lands of Magravatt, Knatas, Magnoeney, and Dorton, situate, lying and being in the precinct of Toaghy, in the county of Armagh, as the same are laid down on the map of the Ordnance Survey of the county of Armagh by the names of Marrassit or College Hall, Kennedies, Manooney, and Darton, containing in the whole 1052A. 1R. statute measure" (including portion of the

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lands sold in this matter) were granted to the said Sir James Matthew Stronge, his heirs, and assigns for ever, subject to the yearly rent of £591 6*s.* 1*d.* over and above all taxes (save as therein excepted), or subject to such increased, diminished, or revised yearly rent or sum as might from time to time thereafter be substituted in the place of the said rent under the provisions of the said Act of Parliament, payable as therein provided.

By a certificate dated in or about the year 1866, the said annual rent was fixed at the sum of £701 8*s.* 10*d.*

By another grant in perpetuity, dated 30th April, 1856, and made between the same parties, in pursuance of the Trinity College Leasing and Perpetuity Act, 1851, certain other lands therein described as "all that and those the towns, villages, hamlets, ballyboes, and parcels of land following—that is to say, Nault, otherwise Naull, Crerum, otherwise Fellows' Hall, and Drumgarre, as the same are laid down on the map of the Ordnance Survey of the county of Armagh by the names of Naul, Crearum, Drumgar, and Drum, containing in the whole 1258A. 2R. 37P. statute measure" (including the other portion of the lands sold in this matter) were granted to the said Sir James Matthew Stronge, his heirs and assigns, for ever, subject to the yearly rent of £610 1*s.* 5½*d.* over and above all taxes (save as therein excepted), or subject to such increased, diminished, or revised yearly rent or sum as might from time to time thereafter be substituted in the place of the said rent under the provisions of the said Act of Parliament, payable as therein provided.

By a certificate, dated in or about the year 1866, the said annual rent was fixed at the sum of £722 8*s.* 11*d.*

Both the said grants were made subject to the reservations of all mines, minerals, and quarries of slate or marble, and all woods and underwoods then growing, renewing, standing, or being in or upon the premises, or any part thereof, save such as had been registered pursuant to the several statutes in that case made and provided, and were also subject to the covenants, conditions, and agreements, on the grantee's part therein contained, including the usual covenant by the grantee to pay the rent thereby reserved, or such increased, diminished, or revised yearly rent as might from time to time, or at any time thereafter, be substituted therefor.

The said Sir James Matthew Stronge, Bart., died on 2nd December, 1864, having by his will devised the said lands to his son James Matthew Stronge, who died on 11th March, 1885, having by his will devised the said lands to his trustees upon trust for John Calvert Stronge for life, and on his death to the use of the first and other sons of the said John Calvert Stronge successively in tail male. By disentailing deed, dated 21st September, 1885, the estate tail in remainder of James Henry Stronge, the vendor, eldest son of the said Sir John Calvert Stronge, was barred; and by indenture of marriage settlement, dated 5th October, 1885, the said lands were settled, after the death of the said Sir John Calvert Stronge, to the use of the vendor for life, with remainders over. The said Sir John Calvert Stronge died on 29th December, 1899.

Portion of the lands comprised in the said grants, respectively, were subsequently sold under the Land Purchase Acts.

As to the lands comprised in the said first-mentioned grant of 30th April, 1856, by order dated 29th November, 1904, as amended by order dated 17th May, 1906, the sum of £188 10*s.*, portion of the said rent of £701 8*s.* 10*d.*, was apportioned on the lands sold in this matter, that is to say, on part of the lands of Marrassit or College Hall, containing 142A. 3R. 15P., part of the lands of Kennedies, containing 69A. 0R. 6P., and part of the lands of Manooney and Darton, containing 58A. 2R. 12P., comprising in all 270A. 1R. 33P. From the affidavit of the vendor, it appeared that in 1899, immediately prior to the sale, the lands sold were held under ten first-term tenancies, two second-term tenancies, and two tenancies created for the purpose of the sale; that the rental thereof was £278 6*s.* 4*d.*; that the Poor Law Valuation was £319 10*s.*; and that the purchase-money was £5423. It also appeared that the gross rental of the entire lands comprised in the grant, for that year, was £898 1*s.* 3½*d.*; and that after deducting £701 8*s.* 10*d.* for head-rent, £44 18*s.* for cost of collection, £1 18*s.* 11*d.* for poor rate, £46 1*s.* 1*d.* for abatements allowed to first-term tenants, and £7 2*s.* representing the average annual loss for the previous ten years for rents irrecoverable out of the said lands, making in all the sum of £801 8*s.* 10*d.*, the net profit rental was £96 12*s.* 5½*d.*

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As to the lands comprised in the said second-mentioned grant of 30th April, 1856, by order dated 29th November, 1904, the sum of £150 2*s.* 7*d.*, portion of the said rent of £722 8*s.* 11*d.*, was apportioned on the lands sold in this matter, that is to say, on part of the lands of Crearum or Fellows' Hall, containing 14A. 2R. 26P., part of the lands of Drumgar, containing 71A. 1R. 35P., and part of the lands of Naul, containing 160A. 2R. 28P., comprising in all 246A. 3R. 9P. From the affidavit of the vendor it appeared that in 1899, immediately prior to the sale, the lands sold were held under two first-term tenancies, two second-term tenancies, one tenancy created for the purposes of the sale, and one sub-grant in perpetuity; that the rental of the lands sold was £213 13*s.* 4*d.*; that the poor law valuation was £264 15*s.*, and that the purchase-money was £4182. It also appeared that the gross rental of the entire lands comprised in the grant, for that year, was £1095 2*s.* 3½*d.* and that after deducting £722 8*s.* 11*d.* for head-rent, £54 5*s.* for costs of collection, £9 for bailiff's salary, £34 7*s.* 4*d.* for wages of caretaker on grazing farms in the vendor's hands, £30 7*s.* 2*d.* for poor rate, £21 4*s.* 3*d.* for abatements allowed to first-term tenants, and £61 4*s.* 2*d.* representing the average annual loss for the previous ten years for rents irrecoverable out of the said lands, making in all the sum of £932 16*s.* 10*d.*, the net profit rental was £162 5*s.* 5½*d.*

S. L. Brown, K.C., and *R. H. Calvert*, for the vendor :—

The object of apportionment is merely to ascertain how much of the head-rent should be redeemed out of the purchase-money of the lands sold. The apportionment should not be taken into consideration in fixing the redemption price. The Court should have regard to the net profit rental issuing out of the entire lands charged with the head-rent, in estimating the security.

W. M. Jellett, K.C., for Trinity College :—

Once an order for apportionment has been made, in fixing the redemption price, the Court is dealing with a rent consisting of the apportioned part, and that part should be dealt with as a separate and entire rent issuing out of the lands sold.

MEREDITH, J.:—

I do not know of any more difficult task than that of fixing the redemption price of rentcharges redeemable under the Land Purchase Acts.

I do not find that familiarity with the work makes the task of fixing redemption prices any the more easy. In endeavouring to carry out the principles that have been laid down by the Court of Appeal, I apply my mind to the special considerations in each individual case that comes before me, and base my decision on the particular facts of each case.

A question arises which up to the present has not been made the subject of direct decision. On former occasions I have considered the matter; but I do not remember actually laying down the principle in express terms which lies at the root of the judgment which I am about to pronounce.

I hold that, for the purpose of fixing the redemption prices of the two sums mentioned in the notice of motion, *i.e.*, the apportioned rents of £188 10*s.* and £150 2*s.* 7*d.*, I am bound to have regard only to the property on which those apportioned rents were charged, and to fix the prices accordingly.

I must take it that the apportionment has been made according to law. No one has quarrelled with it, and the result of that apportionment is this, that the argument with regard to the narrow margin between the total rental and the rentcharge is swept away on the figures, so far as these two sums are concerned. What may be the result when the residue comes to be redeemed in each case, I do not know. It is not for me to prophesy. It may be that the parties have placed too small a proportion on the lands sold. What has been done must remain; and, in my opinion, when the reason for the apportionment is considered, and the object of the statute is borne in mind, it is right and proper that the Court should concentrate its attention only on the particular lands that have been sold, and on the specific part of the rent that has been apportioned on them. The vendor here has chosen to sell only part of his estate; and in order to enable him to do so (it being out of the question, as I assume, to redeem the entire headrents), he applied to the Court to apportion, on the part of the estate that has been sold, specific

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parts of the rents payable to Trinity College. The rent payable to Trinity College out of the lands on the Fellows' Hall portion of the estate that have been sold, as fixed by my order, is £188 10*s.*; the rental of the lands in first-term, second-term, and new tenancies created for the purpose of the sale is £278 6*s.* 4*d.*; and the purchase-money is £5423. On these figures I am prepared to act.

I may add, with reference to the rents generally on this estate, that I can conceive no stronger testimony to the fairness of the rents, and the punctuality of the tenants in paying them, than the statement in the vendor's affidavit, that the average annual loss for the last ten years for rents irrecoverable out of the lands amounted only to £7 2*s.*

I have before me the rental. I have the purchase-money, and the grant. I bear in mind everything that was said in *Close's Estate*(1), and the principles that have been laid down by the Court of Appeal. With regard to my decision in *Dunraven's Estate* (2), that the personal covenant by the grantee, who was the vendor's immediate predecessor in title, to pay the rent, was an element to be taken into consideration in fixing the redemption price, there were special circumstances in that case with reference to the covenant by the grantee. But I know the difficulty of following assets in ordinary cases. I have no evidence of the value of the covenant in this case; and while I have taken the matter into consideration, I do not put any more value on the rent by reason of the existence of the covenant. I see no reason why I should put a lower value on the rent in this case than in *Close's Estate*(1). On the figures before me I fix the redemption price at £4620. With regard to the Fellows' Hall portion of the estate, I apply the same principles. The apportioned rent is £150 2*s.* 7*d.*; the rental is £213 13*s.* 4*d.*; and the purchase-money is £4182. I fix the redemption price at £3680.

Solicitor for the vendor: *H. J. Harris.*

Solicitors for Trinity College: *Maunsell & Darley.*

J. E. W.

(1) [1905] 1 I. R. 371. (2) Land Com., 9th July, 1906 (unreported).

IN RE NAVAN AND KINGSCOURT RAILWAY CO. AND FINGALL.

M. R.
1906.
March 13.

Costs—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 80—*Disentailing deed.*

The costs of a disentailing deed, which is necessary in order to obtain payment of a fund in Court lodged by a Railway Company, are payable by the Company, and a special order will be made as to such costs.

Ex parte Allen (7 L. R. Ir. 124) not followed.

MOTION.

This was an application on behalf of the Earl of Fingall for the transfer and payment out to him of £534 6*s.* Consols, and £28 11*s.* 3*d.* cash, and for an order that the Midland Great Western Railway Company should pay to the applicant the costs necessarily and properly incurred by him in and about the preparation and execution of a certain indenture of disentailing assurance, dated February 26th, 1906, relating to the said sum of £534, Consols, and also the applicant's costs of and incident to the application and to the payment to be made in pursuance thereof when taxed and ascertained.

The fund in Court represented the sum of £488 17*s.* 5*d.* cash, the amount awarded as compensation for the purchase of the fee-simple of part of the lands of Belsaw and Wilkinstown in the county of Meath taken in the year 1871 by the Navan and Kingscourt Railway Company under the Railways (Ireland) Acts, and lodged in Court pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, incorporated with the said Acts. The undertaking and liabilities of the Navan and Kingscourt Railway Company were subsequently taken over by the Midland Great Western Railway Company. The lands of Belsaw and Wilkinstown formed part of the Fingall estates settled by a settlement of 24th January, 1857, upon the then ninth Earl of Fingall for life, with remainder to his eldest son, Lord Killeen, afterwards tenth Earl of Fingall, for life; remainder to the first and other

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In re NAVAN AND KINGSCOURT RAILWAY CO. & FINGALL.

sons of Lord Killeen in tail male. The ninth Earl died on 21st April, 1869, and thereupon Lord Killeen entered into possession of the said estates as tenth Earl as tenant for life thereof.

By order of the Master of the Rolls of 1st May, 1872, made in this matter, it was ordered that the said sum of £488 17*s.* 5*d.* cash should be invested in Government New 3 per cent. Stock, and that the dividends should be paid to the tenth Earl for life or till further order.

The tenth Earl died on 24th April, 1881, and thereupon the applicant, his eldest son, entered into possession of the said estates, and became entitled to the said funds as tenant in tail male in possession.

On 14th May, 1881, the applicant executed a disentailing deed of the said estates; but it did not affect the said funds in Court.

By a further order dated 26th February, 1884, it was ordered that the future accruing dividends on the said stock should be paid to the applicant during his life or till further order.

In 1904 the applicant sold almost the entire of the tenanted lands comprised in the said estates to the tenants thereof under the provisions of the Irish Land Act, 1903.

By indenture dated 26th February, 1906, made between the applicant of the one part and John O'Hagan of the other part, the said funds in Court were disentailed, and conveyed to the use of the applicant absolutely.

J. H. Pigot, for the applicant.

Arthur C. Meredith, for the Railway Company:—

No special order should be made by the Court as to the costs of the disentailing deed; that is a matter for the Taxing Master in the first instance: *In re Merchant Shipping Act*, 1854; *Ex parte Allen* (1)—a decision of the Vice-Chancellor in 1881.

[THE MASTER OF THE ROLLS: I think that I have given a special direction in several cases since that case.]

(1) 7 L. R. Ir. 124.

Pigot: The practice is not quite settled. In *Re Devisees of Nicholas Brooking* v. *The South Devon Railway Company* (1), Stuart, V.-C., allowed the costs of a deed disentailing a fund in Court as costs incurred in consequence of the Company taking the land. The statute there was 7 & 8 Vict. c. lxviii., s. 173, which was nearly in the same words as section 80 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). Similar orders have been made in this Court. [He referred to Brown and Theobald on Railways, 3rd ed., p. 202].

THE MASTER OF THE ROLLS :—

I have over and over again in cases of this sort given the costs of a disentailing deed—and the Registrar bears me out in this. It saves costs which would otherwise be incurred if the matter was left to the Taxing Master. I shall, therefore, make the order asked for.

The order was as follows :—

> "IT is ordered that the Accountant-General do make the payment and transfer in the payment schedule hereto directed; and it is ordered that the said Midland Great Western Railway Company do pay to the applicant the costs of this motion and order and proceedings thereunder, and all costs properly and necessarily payable, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, including the costs incurred by him in and about the preparation and execution of the said disentailing deed, dated the 26th day of February, 1906, when taxed and ascertained."

Solicitors for the applicant: *A. O'Hagan & Son.*
Solicitor for the Railway Company: *John Kilkelly.*

W. L.

(1) 2 Giff. 31.

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July 13, 14, 18, 19, 31.

BRADSHAW AND FALCONER *v.* THE URBAN DISTRICT COUNCIL OF BRAY.

(1906. No. 515.)

Housing of the Working Classes Act, 1890—*Public Health (Ireland) Act*, 1878—*Local Act—Purposes of—Deposit of plans—Extent of incorporation—Basis of compensation—Modification of plans—Injunction—53 & 54 Vict. c. 70, Part III.*—41 & 42 *Vict. c.* 52—63 & 64 *Vict. c. cxcii* (*L. & P.*)—*Compulsory purchase.*

Prior to the passing of a Provisional Orders Confirmation Act, empowering the defendants to acquire compulsorily, from the plaintiffs and from others, certain lands for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening and improving of streets and roads, plans of the lands to be taken, one of which showed a ground-plan of forty-five cottages proposed to be built, a proposed "playground," and a proposed approach 50 feet wide, were duly deposited with the Local Government Board and in Parliament. Section 1 of the Provisional Order in question, which recited the deposit of the plans, described the lands to be compulsorily acquired as "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference"; and the plans were referred to as "the plans showing the lands and premises required for the purposes aforesaid." The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the defendants to carry out the works according to the plan. After the passing of the Act the arbitrator appointed by the Local Government Board assessed the compensation to be paid to the plaintiffs for purchase-money and for injury to adjoining lands, and the amount awarded was paid. Subsequently, modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked "playground," and the making of a 20-foot instead of a 50-foot approach, were prepared by defendants and approved by the Local Government Board, through whom the defendants were borrowing money for the carrying out of the works. On an application for an injunction to restrain the carrying out of the modified plans:—

Held, that the deposited plans were incorporated in the Act only for the purpose of identifying the lands to be compulsorily acquired; that the defendants were, therefore, not bound to adhere to the representation of intention shown on the plan as to the proposed number of cottages, playground, and approach; and that the defendants could not be enjoined while they kept within the purposes mentioned in the Act.

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INJUNCTION MOTION.

Motion for an interlocutory injunction which, by consent, was taken as the trial of the action. The plaintiffs in the writ of summons claimed: (1) An injunction restraining the defendants from deviating from the plans lodged by them with the Local Government Board prior to the passing of the Local Government Board (Ireland) Provisional Orders Confirmation (Housing of the Working Classes) No. 2 Act, 1900 (63 & 64 Vict. c. 192), and referred to in said Act, by building more houses on the property taken under said Act, and by virtue of an award dated 5th March, 1901, than the number of houses set out on the said plans, or by altering the plans in any way. (2) An injunction restraining the defendants from leaving a narrower approach to the property in Purcell's field and Purcell's Terrace, or an approach in any way different from that set out on said plans, or from in any way changing or altering the plans of the houses to be built from the plans lodged when said Act of Parliament was being passed. (3) An injunction restraining the defendants from permitting to remain erected a concrete wall or any wall other than the wall described in said award. From the evidence given it appeared that under the Act referred to in the statement of claim the defendants compulsorily acquired from the plaintiffs a large field called Purcell's field, with two small plots adjoining, and a lane, 9 feet wide, leading from Main-street to Purcell's field, with some adjacent cottages. One of the deposited plans showed a ground-plan of 45 cottages round three sides of Purcell's field, the centre of which was marked "playground," and a proposed approach, 50 feet wide, from Main-street to Purcell's field. It was alleged that this plan was before the arbitrator appointed by the Local Government Board, under the Public Health and Lands Clauses Acts, to assess compensation, and he awarded the plaintiffs £1489 8*s.* 1*d.*, £1129 8*s.* 1*d.* of which was for the lands taken, and £360 for damage by severance and injuriously affecting other lands of the plaintiffs. The award provided for the erection, by the defendants, upon the north and east sides of one of the plots, of a stone wall 5 feet high, which was the subject of the third claim endorsed on the writ. The houses intended to be built by the defendants were one-story cottages which would let at from 3*s.* 6*d.* to 6*s.* a

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week; but, in 1905, the defendants, finding that these rents were too high for many of the respectable poor of Bray to pay, submitted modified plans to the Local Government Board (from whom they were obtaining sanction for a loan for carrying out the work), which provided for the erection of a larger number of two-story houses which would let at about 2*s.* 6*d.* a week each, and the using up for the purpose of the portion of the field marked "playground." The modified plans were approved of by the Local Government Board, through whom the defendants were borrowing the money for the works. The defendants proposed to build fifty-two houses, and reserved to themselves the right to build more, as shown on the modified plans; and they had decided, for the present at all events, to widen the approach from Main-street to Purcell's field to 20 feet instead of the 50 feet shown on the original plans. The plaintiffs are the owners of a considerable number of cottages and of land, which they proposed to use for building purposes, adjoining Purcell's field, and the evidence on their behalf tended to show that the modification of the plans would decrease the benefit to the cottages and increase the injury to the building-land which would result from the defendants' scheme, while they alleged that the arbitrator had awarded compensation upon the basis of the original plans. The Act of 1900, mentioned in the statement of claim, empowered the defendants to compulsorily acquire certain lands and premises for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, opening, and enlarging, and otherwise improving certain streets or roads. Section 1 of the Provisional Order, No. 2, in giving the compulsory power to acquire lands, described them as "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference," and referred to the plans as "the plans showing the lands and premises required for the purposes aforesaid." The deposit of the plans was recited in the Provisional Order. The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the Council to carry out the works according to the representation of intention shown on the plan.

Matheson, K.C., Jellett, K.C., and *Dickie*, for the plaintiffs:—

The plan of the proposed cottages lodged with the Local Government Board and in Parliament, must be regarded as incorporated in the Act of 1900, and the change of plan is a departure from the purposes of the Act. To hold otherwise, would permit the procedure of the Lands Clauses Act with reference to compensation to be used to work injustice. In this case the compensation awarded for injury to other property of the plaintiffs was based on the original plans. The lands taken for widening of streets and approaches, and for making the playground, were taken under sect. 38 of the Public Health Act, as amended, and could not be used for the purposes of Part III. of the Housing of the Working Classes Act: *North British Railway Co.* v. *Tod* (1); *Attorney-General* v. *Hanwell Urban Council* (2); *Attorney-General* v. *Pontypridd Urban Council* (3); *Bostock* v. *North Staffordshire Railway Co.* (4); *Simpson* v. *South Staffordshire Waterworks Company* (5); *Herron* v. *Rathmines Commissioners* (6); *Attorney-General* v. *Teddington Urban District Council* (7); *Glossop* v. *Heston and Isleworth Local Board* (8); *Mayor of Manchester* v. *New Moss Colliery* (9); *Attorney-General* v. *Mayor, &c., of Southampton* (10); *Fletcher* v. *Great Western Railway Co.* (11); Parliamentary Standing Orders as to deposit of plans; Public Health Act, 1878 (41 & 42 Vict. c. 52), sections 38, 203; Vanston's Public Health Act, Supplement, p. 271; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 36; Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

S. L. Brown, K.C., Ignatius J. O'Brien, K.C., and *P. A. O'C. White*, for the defendants:—

If the Court yielded to the argument of the plaintiffs, it would have to decide that where an Act provided that lands might be taken compulsorily under Part III. of the Housing of the Working Classes Act, there must be incorporated the words

(1) 12 Cl. & F. 722, at p. 731.
(2) [1900] 1 Ch. 51, at p. 57; [1900] 2 Ch. 377, at p. 383.
(3) 21 T. L. R. 770; 22 T. L. R. [576.
(4) 3 Sm. & Giff. 283.
(5) 34 L. J., Ch. 380; 4 De G. J. & S. 679.
(6) [1892] A. C. 498.
(7) [1898] 1 Ch. 66.
(8) 12 Ch. D. 102.
(9) 54 W. R. 240.
(10) 1 Giff. 363.
(11) 5 H. & N. 689.

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"and to build upon it houses according to the plans deposited with the Local Government Board." But the plans were incorporated merely for the purpose of showing the lands to be taken; and the defendants, if they had built cottages all over the lands taken, would have been complying with the Act. The plan of cottages in the deposited plans was merely a ground-plan; and the defendants, if they had chosen, might have built houses six or seven stories high. They had to find out what was the Parliamentary contract; but there was no contract to make an approach of any particular width, or to build any particular number or style of houses. [Counsel referred (in addition to the cases cited for the plaintiffs) to *The Attorney-General* v. *Great Eastern Railway Co.* (1) and *Tucker* v. *Vowles* (2).]

July 31.

BARTON, J.:—

In this case it was consented that the motion for an interlocutory injunction should be taken as the trial of the action, the parties to be at liberty to give further evidence and to examine witnesses *viva voce*. As a result, two affidavits filed for the interlocutory injunction were admitted in evidence at the trial, but only subject to all just objections.

Plaintiffs are trustees of the late Mrs. Adelaide Tickell's will in respect of some property, comprising lands and premises in the town of Bray, part of which was compulsorily acquired by the defendants under a Provisional Orders Confirmation Act which became law in 1900. This Act confirmed two Provisional Orders, of which No. 2, with which this case is concerned, empowered the Urban Council to acquire compulsorily certain lands and premises for the purpose (as appears in the preamble) of Part III. of the Housing of the Working Classes Act, 1890, and also for the purpose of widening, opening, enlarging and otherwise improving certain streets or roads within the said town. Among the lands and premises acquired from Mrs. Tickell was a large field called Purcell's field, with two small adjoining plots, comprising in all more than two and a half acres; also the approach to Purcell's field from Main-street, consisting of a narrow lane

(1) L. R. 7 Ch. App. 475. (2) [1893] 1 Ch. 195.

9 feet wide with some cottages adjacent thereto. For convenience, the Housing of the Working Classes Act, 1890, Part III., and the incorporated provisions of the Public Health and Lands Clauses Acts, may be referred to as the principal Acts, and the Provisional Orders Confirmation Act as the special Act.

The plaintiffs seek by this motion and action to restrain the Urban Council from deviating in certain respects from one of the deposited plans which showed the number and site of the cottages proposed to be built on the acquired lands, and the width of the approach from the Main-street. These are the causes of action set forth in paragraphs 1 and 2 of the endorsement upon the writ of summons. There is also a different and comparatively trivial matter complained of in paragraph 3 about a wall, which I shall deal with quite separately at the end of my judgment. The question of the deviation from the deposited plans is the main question in this case, and the one to which the parties attach importance. One of the deposited plans showed a ground-plan of forty-five cottages situated round three sides of Purcell's field, the centre of which was marked "playground," and a proposed approach from the Main-street to Purcell's field, 50 feet wide. The Council now propose to build fifty-two houses instead of forty-five, and to build twenty-eight of them in the form of a street upon the southern end of the field which was marked "playground" on the plan. They have no immediate intention of building more cottages on this site, because these works will exhaust all the money which has been borrowed through the Local Government Board for the purpose. But they assert the right to build as many houses on the field as they think reasonable and proper; and their new plans show that they look forward ultimately to two more streets of cottages being built on the field. They have also decided, for the present at all events, to widen the approach from 9 feet to 20 feet instead of 50.

It was suggested on plaintiffs' part that the motive of this change of plan was to annoy them. In order to rebut this allegation of *mala fides*, I allowed the representations made to the Council upon the subject by ratepayers and charitable associations to be put in evidence. The motive of this change of plans appears to have been to provide more workmen's dwellings, and

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for a poorer class, whose wages do not enable them to pay more than 2*s.* or 2*s.* 6*d.* a week rent. For this purpose, the cottages are to be two-storied instead of one-storied. I may observe in passing that the plaintiffs, *inter alia*, complain of the making the cottages of two stories. But even the deposited plan is silent about the height of the cottages. It only shows a ground-plan. I see no reason to doubt the *bona fides* of the Council. The sole question is whether they have power to do what they propose, or whether they are bound hand and foot to the sites and numbers of cottages and width of approach shown on the deposited plan.

After the passing of the Act of 1900, there was considerable delay in proceeding to acquire and build upon Purcell's field. In the meantime the arbitration under the Public Health and Lands Clauses Acts was held, and the arbitrator awarded to plaintiffs' predecessor in title £1489 8*s.* 1*d.*, £1129 8*s.* 1*d.* of which was for lands taken, and £360 for damage by severance and injuriously affecting her other lands. After Mrs. Tickell's death, the plaintiffs brought proceedings to compel the Council to carry out the purchase, pending which the Council paid the awarded moneys, and the lands were conveyed by plaintiffs to the Council. Afterwards these proposed variations from the original plans were decided on by the Council, and sanctioned by the Local Government Board, through whom the defendants were borrowing the money for the works. If the Act of Parliament does not allow the Council to change their intention as to the site and number of houses to be built, the Local Government Board have no power to sanction any such modification. Section 8 of the principal Act about modification of schemes refers to improvement schemes under Part I. of the Act, and does not affect Part III. However, the Local Government Board always require to see and approve the plan of works before sanctioning a loan, and it may be that it was only on this account that their approval was asked and given.

In the first place let me dispose of the question of the widening of the approach from Main-street: as regards which plaintiffs' claim for an injunction seems to me to fail even upon the hypothesis that this plan of works is binding upon defendants in all its details. What the Council propose to do as regards the

approach is within their powers, and is consistent with their ultimately widening the approach to 50 feet when they have money for the purpose. It will not be all that they are empowered to do; but they are not required to do everything at once. *The Attorney-General* v. *Teddington Urban Council*(1) shows that a lawful immediate user consistent with an ultimate user for the statutory purpose will not be enjoined. Some cottages adjacent to the approach will be left standing, and will continue to be occupied. But the Council propose to improve them, which is one of the purposes authorised by section 59 of the principal Act. No harm will be done to plaintiffs' property. On the contrary, the widening of the approach from 9 feet to 20 feet will benefit it. The complaint is that it will not benefit it so much as a 50-foot approach. But plaintiffs have no right to complain of mere delay or disappointment of hopes of betterment. Something was said about a local bye-law which prescribes 30 feet for the width of carriage-ways. But even assuming that this approach will be a carriage-way, this is not a proceeding to enforce bye-laws. Is this Court to grant what would amount to a mandatory injunction to compel the defendants to proceed immediately to widen this approach to 30 feet or to 50 feet? I have heard no precedent or authority cited for the making of an order of that kind under such circumstances.

But plaintiffs' principal complaint relates to the proposal to build upon the proposed "playground," which would undoubtedly have benefited their adjacent cottages. Plaintiffs have a row of small cottages facing the southern end of the field, but at present separated from it by a high wall; also a row of two-storied cottages at the eastern side with their back walls toward the field. These back walls are bare walls without any windows. I visited this place, and I recommend anybody who wishes to appreciate the evidence to do the same—but not without a guide. Nobody could without a guide thread their way through the labyrinth of squalid cottages and lanes which surround this place. It is right to bear in mind that plaintiffs only recently came into possession of this property, and appear to be taking steps to improve it. There was some discussion—upon which I do not

(1) [1898] 1 Ch. 66.

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find it necessary to give any definite opinion—as to whether plaintiffs will suffer any greater injury (as distinguished from less betterment) by defendants' altered plan than they would have suffered by the original plan. Mr. Matheson ingeniously threw out a suggestion of possible interference with easements of light and air. But no such complaint was made in the affidavits or in the evidence; and a visit to the place, with a view of the southern cottages divided from the field by a high wall and the eastern cottages with their windowless back walls, explains why the affidavits and witnesses are silent on the subject. The main complaint in the evidence is of the anticipated creation of "a congested district." But Purcell's field is a fine large open field. The proposed streets are to be 30 feet wide, which is the regulation width for carriage-ways in the town. What is the meaning of speaking of one or two or three such streets as "a congested district." If two or three streets 30 feet wide were to constitute a congested district, would not every town and every part of every town be in that sense a congested district? The defendants anticipate that the proposed cottages are likely to constitute a bright, airy, and salubrious spot as compared with their surroundings. At all events, no case of apprehended nuisance is made out; and I do not understand such a case to be seriously suggested. It is possible that plaintiffs may entertain a well-grounded apprehension of competition from a better class of cottages than theirs; and that they are disappointed that owing to this change of plans their property will not be so much improved as they expected. I quite believe that if defendants were to remove the high wall opposite the plaintiffs' southern row of cottages, those and the other neighbouring cottages would be increased in value by the proximity of a playground. But there is no obligation on the Council to remove that wall. Even the plan does not say that that wall is to be removed, as it does in the case of two other walls which divide Purcell's field from other small plots of ground. Besides, it is necessary here again to point out that, in the absence of a parliamentary contract to that effect, disappointment at loss of betterment is not a matter of which plaintiffs have any right to complain.

Turning from the facts and history of the case to their legal bearing, I think the case might be disposed of in a very few

sentences. Plans exhibited or deposited before the passing of an Act of Parliament are only binding upon promoters to the extent to which, and for the purposes for which, they are incorporated in the Act. Unless incorporated, and in so far as they are not incorporated, they merely express the intentions of the promoters; and everybody who looks at the plans should understand that the promoters will be at liberty to change those intentions, save in so far as the Act forbids. This ought to be as clearly understood by every landowner who inspects these plans as if it were written across the face of the plan. If a landowner supposes that the mere exhibition or deposit of a plan of works makes it binding upon the promoters, he has himself to blame for his subsequent disappointment. If he wishes to make them binding upon the promoters, in all their details, he should induce Parliament to insert a clause in the Act of Parliament to that effect. These plans, in the present case, are referred to in the special Act only for the purpose of identifying the lands which the Act authorizes the promoters to acquire compulsorily. There is nothing in the principal Acts or in the special Act requiring the promoters to follow or adhere to the sites, or numbers, or measurements of cottages as shown on the plan. This is very different from the provision to be found in both the principal and special Acts in railway and waterworks cases, where strict adherence to plans within specified limits of deviation is always provided for. In the present case the plaintiffs are threatened with disappointment, possibly even with some hardship, but with no legal injury, and with no breach of any parliamentary contract. That being so, no case has been made for the granting of an injunction.

I might be satisfied with thus briefly disposing of the case; but I think it to be my duty to deal fully with the very able arguments addressed to me by counsel for the plaintiffs, which ranged themselves under four principal heads. Mr. Jellett, K.C., in opening the case, relied mainly upon two points; (1) that the plans of the proposed undertaking were the basis of the compensation awarded by the arbitrator for injuriously affecting the lands; and (2) that this change of plans amounts to a departure from the purposes of the special Act; Mr. Matheson, in his reply, urged (3) that the plan of the proposed cottages should be regarded as

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incorporated in the special Act for all purposes; and (4) that the whole procedure of the Lands Clauses Act would be nugatory if it were allowable to depart from the plan of the undertaking deposited under these Acts. I shall deal briefly with these four arguments.

As regards the arbitrator's award, I have very little doubt that this plan was before him, although it does not appear to have been one of the plans with which he was required to be supplied, or which he was required to return and did return to the Local Government Board. But assuming that to be so, how can it affect the construction of the Act of Parliament? How can the Act of 1900 be construed by reference to what was said or done in connexion with the arbitration and award of 1901? The arbitrator attended here at the trial, on subpœna; but plaintiffs did not call him as a witness. I think they were quite right, because his evidence would have been immaterial. Even if he could have proved any possible hardship to plaintiffs, the remedy cannot be to misconstrue the Acts of Parliament. There have been cases of hardship where landowners, by mistake, never received any notice, and yet were held bound by the statute. In *The Attorney-General* v. *Great Eastern Railway Co.* (1) Mellish, L.J., pointed out, at p. 482, that, even if a representation on a plan prevented an interested party from opposing the Bill in Parliament, he would have no remedy unless the plan was afterwards so incorporated in the Act as to protect him.

This brings me to the second branch of the argument, namely, that this change of plan is a departure from the purposes of the Act. But "purposes," in all the cases cited in this connexion, means purposes *specified in the Act.* The purposes of this Act are specified in the preamble and are twofold, namely, (*a*) the purposes of Part III. of the principal Act, *i.e.* the building or improving of workmen's dwellings; and (*b*) the widening, &c., of streets. Those purposes are not departed from in this new plan. The cases cited upon this branch of the argument were *Bostock* v. *North Staffordshire Railway Co.* (2); *The Attorney-General* v. *Hanwell Urban Council* (3); and the *Pontypridd Case* (4), in the *Times* Law

(1) L. R. 7 Ch. App. 475. (2) 3 Sm. Giff. 283.
(3) [1900] 1 Ch. 51; [1900] 2 Ch. 377. (4) 21 T. L. R. 770; 22 T. L. R. 576.

Reports. But in each of those cases the particular purpose in question was a purpose specified in the special Act. In *Bostock's Case* (1) it was a "reservoir" and "for no other purpose or use whatsoever." In the *Hanwell Case* (2), there was, as Lord Alverstone pointed out, at p. 382, "an express recital in the Act" that the Sanitary Authority required to purchase and take the lands for the disposal of the sewage of the parish of Hanwell, and it was proposed to devote it to a hospital for infectious diseases. In the *Pontypridd Case* (3) the specified purpose was for a supply of electricity, and it was proposed to devote it to that of a "refuse-destructor." In the *Hanwell Case* (2), which was the one most relied upon, Lord Alverstone based his whole judgment upon the purpose being restricted by the statute. What weighed with Rigby, L.J., was the danger of opening a door to evasion of the statute. Collins, L.J.'s, illustration of a recreation-ground converted into a sewage farm assumed that the former was the statutory purpose. In the present case the Council's new plan is within the purposes of the special Act. Indeed, it is more so than the earlier plan, as the playground would seem to come rather under other statutory powers than under those conferred by either the special or general Acts which are applicable here.

Then I approach what is really the crucial question in this case, that is, the question whether the plan of the proposed cottages is incorporated in the special Act to the extent and for the purpose of binding the Urban Council not to deviate from the numbers and site of the cottages as delineated on the plan. I draw no distinction between the plans. I take it that all the deposited plans are referred to and incorporated in the special Act. But to what extent and for what purpose are they incorporated? That is the real question in this case.

The answer to that question must turn entirely upon the construction of the principal and special statutes affecting the case. Accordingly, I shall deal with them in their order. As regards the principal Act (the Housing of the Working Classes Act, 1890, Part III.), that part of the Act leaves the Urban Council free as to the number and site of cottages to be built upon land to be

(1) 3 Sm. Giff. 283. (2) [1900] 1 Ch. 51; [1900] 2 Ch. 377.
(3) 21 T. L. R. 770; 22 T. L. R. 576.

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acquired or appropriated by them thereunder. Section 57 enables the Urban Council to acquire land by agreement or compulsorily with the aid of the Public Health Act and Lands Clauses Acts, or to appropriate to the purposes of the Act land already vested in them for other purposes. Section 59 leaves them free to build what and how and where they please. In the incorporated sections of the Public Health and Lands Clauses Acts there are provisions requiring lodgment or deposit of plans, but none requiring adherence to them. Accordingly, the principal Acts differ essentially in this respect from the Railways and Waterworks Clauses Acts which sanction the construction of, and regulate strictly the carrying out of, the undertakings to which they relate. A reference to sections 6 to 15 of the Railways Clauses Consolidation Act, 1845, and to sections 6 to 12 of the Waterworks Clauses Consolidation Act, 1847, will show how strictly railway and waterworks companies are bound down to construct their works according to the plans and within certain limits of deviation delineated on those plans. There is nothing of the kind in the statutes governing the present case. A plan of the undertaking must—as in all cases falling under section 203 of the Public Health Act—be deposited in the town clerk's office in the November before the passing of the Act; and by the regulations of the Local Government Board must accompany the petition to the Local Government Board. It must also be lodged with Parliament with the other plans according to Standing Orders. But there is nothing in the principal Act or in the incorporated Acts requiring the local authority to adhere to that plan or to build according to it. This is very intelligible. No statutory authority is deemed necessary to enable the Urban Council to build cottages on lands which they acquire or appropriate, or to regulate their discretion as to the site and number of such cottages. Railways and reservoirs are in themselves extraordinary and dangerous works which require strict regulation for the protection of the public. But the building of a workman's cottage is in itself an ordinary and harmless and beneficial proceeding which every man is as free to do on his own property as he is to walk over it. If the local authority use their land unlawfully so as to create a nuisance, every neighbour has his ordinary remedy. The principal Act does not authorize unlawful user of

acquired lands. But so long as they use it lawfully, the principal Act and the incorporated Acts do not restrict the Urban Council as regards the number or site of the cottages which they are to build. I need hardly point out that different considerations are applicable to another code of Acts which sometimes comes before the Courts. I refer to the Labourers Acts. The question of site there is often a very crucial one; and provisions are inserted on the subject in the Labourers Acts which are not required, and are not to be found in the Housing of the Working Classes Act.

I next turn to the special Act in order to see if there is anything in it binding the Council to build according to the deposited plans. The deposited plans are referred to and defined in the preamble as "the plans showing the lands and premises required for the purposes aforesaid." These purposes are the purposes of Part III. of the principal Act and the widening, &c., of streets. Then section 1, which is the only relevant section, does nothing more than give compulsory power to acquire "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference." The special Act only refers to the deposited plans for the purpose of identifying the lands to be taken. It protects the landowners from having any lands taken from them save the lands described in the plans; but it does not restrict the power which the Council have under the principal Act of building cottages in any lawful position and way that they may think fit. How different from the cases cited in argument. In every one of those cases there were regulations to carry out the work according to the plan. Take, for example, *Herron's Case* (1), where it was laid down, at p. 523, that the promoters were bound to comply with the letter of the enactment so far as it made provision on behalf of the landowner. In that case the Act contained, in sections 9 and 13, provisions requiring adherence to levels as shown in the plans subject to certain lateral deviations. What bearing can that case have upon the present case? In *Simpson* v. *South Staffordshire Waterworks* (2), the special Act provided, in its fifth section, that the waterworks shall be made "in the line and situation and on the levels," &c.,

(1) [1892] A. C. 498.
(2) 4 De G. J. & S. 679.

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"delineated on the said plans." That section was described by Lord Westbury as "the material section of the special Act," and was the foundation of his judgment. There is nothing of the kind in the present case.

Upon this subject of the incorporation in a statute of deposited or exhibited plans, the leading case is the *North British Railway Co.* v. *Tod* (1). In that case Lord Cottenham laid down the rule in words which have never been improved upon. He said, at p. 731:—"Now as to the effect of plans exhibited previous to . . . the Act of Parliament being obtained . . . the rule of the Courts . . . . is no longer a matter of any doubt or dispute. If a contract or an Act of Parliament refer to a plan, to the extent that the Act refers to the plan, and for the purpose for which the Act or contract refers to the plan, undoubtedly it is part of the contract or part of the Act; about that there is no dispute. A contract or an Act of Parliament either does not refer to a plan at all, or it refers to it for a particular purpose." Lord Cottenham then referred to the case of *The Feoffees of Heriot's Hospital* v. *Gibson* (2), and went on to say that "what had been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord Eldon and Lord Redesdale in the case of Heriot Hospital." Lord Campbell said, at p. 735:—"Now there certainly was a representation made here on the part of the Company when they proposed to bring in an Act of Parliament . . . . But this was entirely an intimation on the part of the Company that such was their intention. An Act of Parliament of this sort was by Lord Eldon, and by all other judges who have considered the subject, considered as a contract. Well, then, this was a negotiation; it was a contract. We must disregard what took place; we must look to see what the contract was. The contract is to be gathered from the words of the Act of Parliament. The Act of Parliament must be considered as overruling and doing away with anything that had taken place prior to the time when the Act of Parliament passed, and renders the representation or

(1) 12 Cl. & F. 722. (2) 2 Dow, 301.

proposal of the Company pending the Act of Parliament of no avail. Many cases have occurred in the Courts of Common Law, in which it has been held that everything that takes place before a written contract signed by the parties is entirely to be disregarded in construing the contract by which they are bound." And then he points out that Mr. Tod might have had a clause inserted for his protection. Reference may also be usefully made to two previous cases in the House of Lords: the *Feoffees of Heriot's Hospital* v. *Gibson* (1) and *Gordon* v. *Majoribanks* (2). In the former case Lord Eldon, at p. 311, ridiculed the notion that the exhibition of a plan "with a beautiful view of the disposition of the grounds" was to be held as "a warranty"; and held that it amounted only to this, that the parties "might entertain a rational hope that what was exhibited might be done." In the latter case the complaint was that there had been a deviation from a plan which showed a garden and grounds "in which" (see p. 102) "the health and comfort of the inhabitants appear to have been consulted by disposing of the back ground into areas for the promotion of a free circulation of air, and adding beauty to the appearance, as well as affording convenience to the inhabitants from which no deviation ought to have been permitted." That sounds very like some of the complaints which have been made in the present case. But Lord Eldon refused to hold that a plan showing such a garden and grounds was to be held to be a contract that it should not be built upon or should be always kept in the state in which it was delineated on the plan; and, at p. 106, he declared it to be "a most surprising thing to hear such a contention put forward." In my opinion these cases all apply to the present case. There has been a change of intention on the part of the defendants, and a consequent disappointment of plaintiffs' hopes. But there has been no parliamentary contract to adhere to the plans, and there is no ground for claiming an injunction against deviation from them.

There remains Mr. Matheson's argument that the refusal of this injunction would render the whole procedure under the Lands

(1) 2 Dow, 301. (2) 6 Dow, 87.

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Clauses Act nugatory. This argument was most persuasively presented. But, after all, it begs the whole question. It was for Parliament to say how far the deposited plans should be incorporated in the statute and made binding on the promoters. Mr. Matheson laid great stress upon the words "plan of undertaking," and injury "from execution of works," in the Lands Clauses Acts, and upon the Standing Orders of Parliament requiring the lodgment of these plans. But the Lands Clauses Acts do not compel adherence to the plans; and in *Tod's Case* (1) Lord Cottenham, at p. 733, completely disposes of the point as to Standing Orders. It matters not, in construing the Act, what the Standing Orders require. We can only look to the Act of Parliament itself. Plans deposited under Standing Orders can have no effect upon the enactment save in so far as they are incorporated therein. In the present case, Parliament, in the special Act, incorporated and made binding these plans in so far as they identified the lands to be taken, and to that extent protected the landowners from any interference with their property. But Parliament did not think fit to hamper and confine the discretion of the Council as to where or how they should build cottages on the lands so acquired. To do so would be, I dare say, unreasonable, unworkable, and unnecessary. If a council cannot be trusted to exercise its discretion as to the site and number of cottages to be built, their power of carrying out the beneficial provisions of the principal Act is indeed of a narrow and restricted kind.

Lastly, I come to a wholly different and comparatively trivial question of the stone walls. The award provided that the defendants were to erect upon the north and east sides of another plot (21) a stone wall 5 feet high. The first question is as to the identity of the north and east side. The points of the compass do not point directly towards the sides. There is, in the strictest sense, no north side and no east side. But it is admitted that two sides of the plot are the subject-matter of this provision in the award. Which are they? It is a question of identification. I am of opinion that the side A to C on the marked plan is the

(1) 12 Cl. & Fin. 722.

northern side. It is nearly north. It follows that C to D must be the eastern side. The plaintiffs must contend that A to B is the northern side, which I cannot accede to. For identifying a subject-matter in a contract or award, evidence of surrounding circumstances at its date may be admissible. Plaintiffs gave evidence to the effect that A to B and A to C were the only exposed sides. On the other hand, evidence was given for defendants that the wall on the side D to C was broken down and had to be, and has been, rebuilt, and that A to B was proposed to form, and does form, the back of a row of houses, so that no special arrangement for a wall was necessary or appropriate there. The defendants have built stone walls on the two sides which I find to be the north and east, except that 16 feet of the northern wall is concrete instead of stone, where it joins the back or gable of a new cottage, or of the yard and outhouse of a cottage. It is said that the plaintiff never complained of this 16 feet of concrete till it was done; and that the difference in cost between 16 feet of stone, and 16 feet of concrete would be only about 9*s*. But that would not be the measure of damage. A stone wall with a patch of concrete is unsightly, and not a compliance with the award. I shall give a declaration of plaintiffs' rights with liberty to apply. The defendants have succeeded altogether as regards the injunction, but not altogether as regards the wall. I shall give them the costs of the motion and action, less by any costs occasioned by this matter of the wall, which is the matter complained of in the third paragraph of the claim endorsed upon the writ of summons.

Solicitors for the plaintiffs: *Redington & Sainsbury.*
Solicitors for the defendants: *Hamilton & Craig.*

W. M'G.

M. R.
1906.

Jan. 26.

Appeal.
Feb. 20, 21.

BLAIR *v.* CRAWFORD.

Practice—Motion to stay proceedings—Former action between same parties for the same cause—Res Judicata—*Estoppel—Frivolous and vexatious proceeding—Infant.*

B., who had carried on the business of a tailor and stationer at Ballymena, in the county of Antrim, by his will, dated the 7th October, 1900, left his property to the defendants, his executors and trustees, on trust to carry on his business, with a power to sell if they thought fit. B. died in December, 1900, leaving a widow and two sons, both minors. The defendants appointed Mrs. B. to manage the stationery business, and appointed a manager to carry on the tailor's shop, but after three months it was discontinued. The plaintiff stated that Mrs. B. was, to the knowledge of the defendants, of intemperate habits, and in consequence the business fell off and the assets were wasted. In January, 1902, the defendants sold the stationery business for £500. Mrs. B. died on the 16th July, 1902.

In November, 1902, an action was brought on behalf of W. B. and H. B., the sons of the testator, who were then minors, by D. B., their next friend, against the defendants (1) for administration of the assets of B., and (2) for an account of the assets on the basis of wilful default. The action was tried before Barton, J., in January, 1904, who held that the defendants had not been guilty of wilful default, and dismissed the action. After the trial it was alleged by W. B. that the next friend of the minors entered into an agreement not to appeal against the decision, and that this agreement was made, not in the interest of the minors, but that it was part of a compromise which included other matters in which the minors had no interest.

W. B. came of age in 1905, and brought an action against the same defendants (1) for administration of his father's assets, and (2) for a declaration that the defendants had been guilty of wilful default. The plaintiff averred in his pleading that the facts in connexion with the management and discontinuance of the tailoring business had been omitted from the former action; that the plaintiff was entitled to have the decree set aside for fraud, the fraud consisting of the denial by the defendants at the former trial of Mrs. B.'s habits of intemperance; that the plaintiff was entitled to an ordinary decree for administration; and that the time for appealing having expired before the plaintiff came of age, it was impossible for the plaintiff to obtain redress except by a second action.

The defendants moved to stay the proceedings, on the ground that the

plaintiff's claim was barred by the judgment in the former action, and that the proceedings were frivolous and vexatious:—

Held, by the Master of the Rolls, (1) that the plaintiff was not estopped from proceeding by the judgment in the former action, and (2) that the circumstances in connexion with the alleged agreement against the appeal were such that the action should not be stayed.

Held, by the Court of Appeal, that the judgment of the Master of the Rolls should be affirmed on the second ground, without expressing any opinion on the first.

WILLIAM BLAIR had in his lifetime carried on the business of a tailor, and also of a bookseller and stationer, at Ballymena, in the county of Antrim. He made his will, dated the 7th October, 1900, to the following effect:—

> "I desire that all my property and effects be placed in charge of Robert Crawford and Robert Milliken, both of Ballymena, whom I appoint executors and trustees of my will. I direct my business to be carried on by my trustees as heretofore, and the proceeds to be used for the upkeep of my wife and children and education of my children until my youngest son attains twenty-one; and if my trustees think right to dispose of said business before my youngest son attains twenty-one, then I direct that an annuity of £10 yearly be paid to my wife during her lifetime. In case the business is carried on until Harry reaches twenty-one, the entire effects and property of every description to be divided in equal shares between my sons Willy and Harry, they paying thereout to my niece, Annie M. Agnew, the sum of £50, and also an annuity of at least £10 yearly to my wife."

The said William Blair died on the 8th October, 1900, and probate of the will was granted on the 18th January, 1901, to the defendants, Robert Crawford and Robert Milliken, the executors named in the will. The testator left him surviving his widow, Annie Blair, and two sons, William, plaintiff in this action, and Henry, both of whom were minors. The widow, Mrs. Blair, died on the 16th July, 1902, intestate. The defendants, immediately after the testator's death, possessed themselves of the assets of the testator, and took over the management of, and carried on and conducted, the business of the testator. The defendants valued the gross personal estate of the testator at £943 19*s.* 2*d.*, but the plaintiff averred that this was an undervalue, and that the defendants had never furnished the plaintiff

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with an account of the personal estate of the testator, or what had become of it.

The defendants appointed one David Blair, a brother of the testator, to carry on the tailoring business of the testator, and it was carried on for three months, until, in February, 1901, the defendants discontinued it. The plaintiff averred that this was done because the defendant Robert Crawford was a partner in a rival tailoring business of Barclay & Crawford, and that by abandoning the tailoring business the defendants inflicted damage on the trust estate.

The defendants appointed Mrs. Blair to manage the stationery and bookselling portion of the business. The plaintiff averred that Mrs. Blair was, to the knowledge of the defendants, of intemperate habits, and unfit to manage the business, and in consequence she wasted the assets. The plaintiff alleged that in so doing the defendants were guilty of a breach of trust, wilful default, and *devastavit*.

In January, 1902, the defendants sold the said business of stationery and bookselling, with the stock-in-trade, for £500. The plaintiff averred that the sale was negligently and improperly conducted, and was made at a gross undervalue.

On the 18th November, 1902, an action was brought in the Chancery Division, on behalf of William Blair and Henry Blair (who were then minors), by David Blair, their next friend, as plaintiffs, against Crawford and Milliken as defendants, (1) for administration of the personal estate of William Blair; (2) for an account of the personal estate of William Blair on the footing of wilful default. The defendants filed a defence, traversing most of the allegations in the statement of claim, and denying that they had been guilty of wilful default. The action was tried before Barton, J., in January, 1904. Several witnesses were examined, and the hearing extended over four days. His Lordship held that the defendants had not been guilty of wilful default, and dismissed the action without costs.

After the trial of the action it was alleged by the now plaintiff that the next friend of the minors entered into an agreement with the defendants not to appeal against the order of Barton, J. The plaintiff alleged that this agreement was not made in the

interest of the minors, but was part of a compromise which included other matters in which the minors had no interest, and the plaintiff submitted that he was prejudiced by this agreement, as it had stopped the appeal, which would otherwise have been taken, from the decision of Barton, J.

In the affidavits filed in support of the motion it was stated that Mr. Currie, a solicitor in Ballymena, had acted as solicitor for the next friend with regard to the alleged agreement, and that he could give material evidence as to the alleged compromise. He refused to make an affidavit on the motion.

William Blair came of age in the month of July, 1905, and shortly after, in July, 1905, he brought this action against the defendants—(1) for the administration of the personal estate of his father; and (2) for a declaration that the defendants had been guilty of wilful default, and for an account grounded on wilful default. This action was in the Court of the Master of the Rolls.

In his statement of claim in the second action the plaintiff pleaded that he was entitled to have the judgment of Barton, J., set aside on the following grounds:—(1) The plaintiff was a minor at the time the action was brought and tried, and was, therefore, not responsible for the manner in which the action was framed and conducted. (2) The matters complained of in this action about the management and discontinuance of the tailoring business were wholly omitted from the statement of claim in the former action; and the plaintiff alleged that if these matters had been set forth and proved, the judgment would have been in favour of the plaintiff. (3) The plaintiff was entitled to have the judgment set aside for fraud, the particulars of the fraud consisting of this—that the defendants at the former trial denied that they knew that Mrs. Blair was of intemperate habits, and that statement was untrue. (4) The judgment that the defendants were not guilty of wilful default was against the evidence and the weight of evidence. (5) The plaintiff was entitled, in any event, to an ordinary decree for administration, which would have imposed on the defendants the obligation to account for the assets come to their hands. (6) The time for appealing against the judgment had expired before the plaintiff attained the age of twenty-one years; and the notes of the

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evidence at the former trial having been destroyed, it was impossible for the plaintiff to obtain redress in any other way than by bringing this action.

The notes of the evidence were not procurable, because at the trial of the former action it was agreed between the parties to that action that a shorthand writer should be employed to take the evidence. In consequence of this arrangement, the officer of the Court did not take the evidence; the shorthand writer had destroyed his notes, as it was stated not to be customary to preserve notes for more than a year.

The defendants denied that they had acted improperly in the administration of the assets; they denied any knowledge of the intemperate habits of Mrs. Blair, and stated that they had fully accounted for the assets.

The defendants applied to the Court for an order that all further proceedings in the action should be stayed, on the ground that the plaintiff's action was barred by the judgment of Barton, J., in the former action, dated the 23rd January, 1904, and on the ground that the present action was frivolous, vexatious, and irregular.

Matheson, K.C., and *M'Cutcheon*, for the defendants.

Ronan, K.C., and *Bartley*, for the plaintiff.

SIR A. M. PORTER, M.R.:—

It is not possible for me to avoid allowing this action to proceed. I am not expressing any opinion now when I say that if the party who brought the former action was an adult, I would have dealt differently with the case. But it is the case of an infant, who, it is true, was nearly of age at the time of the trial of the former action, but still was an infant. There are, besides, two grounds on which it seems to me that I ought not to stay the action at this stage. The first is that a new case is now made which was not open on the pleadings, or relied on as an act of wilful default in the former action, namely, as to the tailoring business which had been carried on by the deceased testator. It

is true that the circumstances as to the abandonment of this business by the executors were to some extent gone into and dealt with by the judgment of Mr. Justice Barton; but technically —and I must deal with the case technically, as it is the case of a minor—it was not relied on by the plaintiffs in the former action as a separate ground of wilful default.

Another ground on which it seems to me that I ought not to stay the proceedings is, that the case was heard in January, 1904, and in February an arrangement was come to between the guardian of the plaintiff and the defendants, contained in a letter of February 4th, 1904, as to the effect of which I pronounce no concluded opinion. It is headed *Blair* v. *Crawford.*

> "DEAR SIR,—In reference to the above case, I beg to say that in taking action in the matter as guardian of the minors I acted on incomplete information, and, now that the case has been heard and decided, I beg to withdraw the statements made by me, reflecting on your character and conduct as one of the executors in the case. I believe you acted in the way you considered right under the circumstances, and I wish you to understand that I have no ill-feeling towards you, either in respect of the above lawsuit or any other matter. I trust you will accept this letter in the same spirit in which it is sent by me, and that for the future there may be friendship between us, and that the law proceedings may be treated as at an end.
>
> "Yours truly,
>
> "DAVID BLAIR."

It is alleged that this letter and the circumstances under which it was written show that there was a compromise, including matters with which the plaintiff was not concerned and matters which vitally concerned him; and in consequence of that compromise, the time for appealing from this judgment of Mr. Justice Barton was allowed to run out. I do not say that it is so; but such is the allegation. Although I have a reluctance, amounting to repugnance, to inquire into the facts of a case which have been decided by a Judge of co-ordinate jurisdiction, I must make no rule on this motion. I cannot think that I ought summarily to stop the case at this stage. No one will be better pleased than I if the Court of Appeal should relieve me of the difficulty. I shall reserve the costs of this application; and I give notice that if there is any

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question of fact on which I may have a doubt in my own mind, I shall unhesitatingly give effect to the opinion of Mr. Justice Barton, if I find that he gave a decision on the point.

As I am not now trying the case, I, of course, pronounce no judgment at present on any question of fact.

W. L.

Appeal. Feb. 20, 21.

The defendants appealed (1).

Matheson, *K.C.*, and *M'Cutcheon*, for the appellants :—

We submit (1) that the plaintiff is estopped by the decision in the former action; and (2) that this action is frivolous and vexatious, because it is an attempt to try the same cause of action a second time. A judgment, decree, or order of the Court by which the rights of the parties have been determined can be pleaded to a new action for the same matter, even if the party bringing the new action were an infant at the time of the former suit: Daniell's Chancery Practice (6th ed.), 480. Where a judgment has been obtained by fraud the Court has jurisdiction in a subsequent action brought for the purpose to set the judgment aside: *Cole* v. *Langford* (2); and there is no difference in principle between Common Law and Equity as to that. But the Court would be slow to interfere in a case of alleged false swearing; if it were otherwise, actions would go on indefinitely: *Flower* v. *Lloyd* (3); *Boswell* v. *Coaks* (4). The fact of the plaintiff being a minor at the time of the former action makes no difference. The only difference between a minor and an adult seeking to set aside a decree on the ground of fraud is that, under the old practice, an infant petitioning for leave to file a bill of review was not required to give evidence that the knowledge of the facts relied on could not, by reasonable diligence, have been previously obtained: *Re Hoghton* (5).

(1) In the Court of Appeal, before PALLES, C.B., and FITZGIBBON and HOLMES, L. JJ.

(2) [1898] 2 Q. B. 36.

(3) 10 Ch. D. 327.

(4) 6 The Reports, 167.

(5) L. R. 18 Eq. 573.

Ronan, K.C., and *Bartley*, for the plaintiff :—

The judgment in the former action is not a bar to the present proceeding. There were two grounds of wilful default alleged in the former action, and the Court held that neither of these was proved. That does not estop the plaintiff from proceeding to obtain an ordinary decree for administration, nor does it estop the plaintiff from obtaining a decree for wilful default, for other acts of default. A decree for wilful default does not decide that only one act of wilful default has been committed; the plaintiff must at least allege and prove one, but that does not estop him from going into Chambers and proving others. The plaintiff need not prove wilful default at the hearing: *Re Youngs* (1); but if, in the prosecution of the inquiry at Chambers, acts of wilful default turn up, the plaintiff can get an order to take the accounts on the basis of wilful default: *Re Barclay* (2).

Even if the decree of Barton, J., is a bar, the allegations here are sufficient to entitle the plaintiff to have the case re-tried. In the Court of Chancery, where cases were wholly tried by Judges, the mode of proceeding to have the case re-tried was by Bill of Review, and that was a new trial motion and a new trial both in one. The old jurisdiction of proceeding by a Bill of Review is still in force: *Falcke* v. *Scottish Imperial Insurance Co.* (3).

A minor is as much bound by a decree as an adult; but under extraordinary circumstances, such as fraud, an infant has been allowed to show against a decree dismissing his bill: Seton on Decrees (6th ed.), p. 981. But an infant was never bound by the negligence of his next friend: Simpson on Infants, p. 477; *Re Scott and Alvarez* (4). There is no necessity now to obtain the leave of the Court before bringing an action in the nature of a Bill of Review: *Boswell* v. *Coaks* (5).

Our proceeding to set aside the former decision is based on two grounds—(1) we make a clear case for a Bill of Review on the ground that there is a large amount of evidence which was not before the Court on the trial of the former action; and (2) we

(1) 30 Ch. D. 421.
(2) [1899] 1 Ch. 674, 681.
(3) 35 W. R. 794.
(4) [1895] 1 Ch. 596, 622; [1895] 2 Ch. 350.
(5) 6 The Reports, 167.

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propose to show that the defendant misled the judge, and obtained a wrong judgment on false evidence, because he knew that the widow of the testator, who was left to manage his business, was a drunkard.

Feb. 21.

PALLES, C.B. :—

This is an appeal from an order of the Master of the Rolls refusing a motion to stay proceedings in this action upon the ground that the proceeding was barred by the decision in a former suit, and, consequently, was frivolous and vexatious.

The authorities upon the point of staying an action on the ground that it was frivolous and vexatious, have been much extended in recent years. The well-known case of *Lawrance* v. *Lord Norreys* (1) is one in which the exercise of this jurisdiction was probably carried to its high-water mark. It was, however, a decision of the House of Lords, and the principle—a beneficial principle—established by it has, since its decision, been treated as settled law, and applied in a vast variety of circumstances.

Acting upon it, if it had clearly appeared upon the motion that the decree in the former suit, if pleaded in the present action, would have been a conclusive bar to it, I should have been of opinion that we ought to stay the action instead of leaving the defendants to plead the decree. In other words, putting forward a claim clearly capable of being answered by a plea of *res judicata* would, in my opinion, be frivolous and vexatious within the rule. To that I must, however, add that in acting under that summary jurisdiction to stay proceedings upon the ground that they are an abuse of the process of the Court, and before making a summary order to stay, which deprives a plaintiff of that which is, *prima facie,* his legal right, *i.e.* his right of having his action brought to trial, the Court ought to be astute to see that there is no real question capable of being tried.

The Master of the Rolls has given two distinct reasons for his judgment. In agreeing with him that the motion ought to be refused, I prefer to confine my decision to one only of these grounds,

(1) 15 A. C. 210.

and for this reason principally. It is well known in Common Law actions that if a verdict is set aside and a new trial ordered, except when it is necessary to lay down the law for the guidance of the Judge at the new trial, usually the Court pointedly abstains from saying anything that may in any way prejudice the subsequent trial. This principle applies, in my opinion, with even greater force to a Court of Appeal than to one of first instance. I would find it difficult to say anything as to the first ground mentioned in the judgment of the Master of the Rolls without indicating my views on questions which must be determined at the trial; and I wish, as far as I possibly can, to leave these questions wholly untouched. The decision of this motion will go no further than this, that the case is not to be cut short summarily.

The ground on which this order ought, in my opinion, to be affirmed is that secondly relied upon by the Master of the Rolls. If it be established as a matter of fact that within the time for appealing against the decree relied on, and possibly with a view to preventing an appeal being brought, a compromise was entered into between the next friend of the infant and the defendants, under which a personal benefit accrued to the next friend, I could not hold as a matter of law that the decree could be relied upon as a bar against the present suit. I do not say that I am satisfied that there was any such bargain here. But a case has been made which shows that the plaintiff has a right that that matter should be considered, and considered upon evidence not before us, and which the plaintiff cannot reasonably be held bound to have brought before us. It is necessary that the evidence of Mr. Currie should be before the Court, that the plaintiff should have an opportunity of cross-examining him, and that the whole of this rather extraordinary transaction should be investigated. It is absolutely impossible that this can be done on this motion, because there is no affidavit from Mr. Currie. His evidence ought to have been brought forward by the defendants. It could not have been expected that the plaintiff would have made him his witness.

Upon this short ground that there is matter of fact fit to be investigated, which cannot be entered upon on the hearing of this motion—and for this reason, and without offering an opinion on any of the other matters discussed—I hold that the action is a fit

Appeal. 1906. BLAIR v. CRAWFORD.

one to proceed in the ordinary course, and consequently that the appeal ought to be dismissed with costs.

FITZ GIBBON and HOLMES, L.JJ., concurred (1).

Solicitor for the plaintiff: *W. J. Stewart.*
Solicitor for the defendants: *J. A. M. Steele.*

R. D. M.

MAC LAUGHLIN *v.* CAMPBELL.

M. R. 1906. May 3. *Appeal.* June 20.

Charity—Gift to—Will—"Roman Catholic purposes"—General charitable intent—Christian Brothers—Gift for teaching—Monastic Order.

Bequest to trustees in trust "for such Roman Catholic purposes in the parish of Coleraine and elsewhere as they deem fit and proper":—

Held, by the Master of the Rolls and the Court of Appeal, that the bequest was void.

Bequest in trust for the establishment in the parish of Coleraine of "a community of Christian Brothers (2) for teaching purposes":—

Held, by the Master of the Rolls, void.

No appeal was taken on this question.

BY his will, dated the 18th of May, 1898, John Glenn left all his real and personal property to the Rev. John Carroll and Daniel MacLaughlin, and he directed them to apply it "for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper."

By a codicil, dated 13th February, 1903, the testator, after leaving certain pecuniary legacies, directed as follows:—"I confirm my said will; but in the event of the disposition therein being held to be void for uncertainty, I bequeath the said residue to the Rev. John Carroll, P.P., Coleraine, for such charitable purposes in his said parish as he shall think right, including the improvement and maintenance of the Catholic church

(1) The action was tried in Trinity Sittings, 1906, by the Master of the Rolls, who dismissed the action with costs.

(2) Admittedly a Monastic Order, though a most valuable Order of Teachers. See *Murphy* v. *Cheevers* (17 L. R. Ir. 205).

there, and also the schools." By this codicil the testator appointed the Rev. John Carroll and Daniel MacLaughlin executors.

By a further codicil testator bequeathed to his executor £2,000 in trust for the establishment of a Community of Christian Brothers in the parish of Coleraine, for teaching purposes. The Christian Brothers were admittedly a Monastic Order.

The testator died on the 25th April, 1904, and probate was granted to the two executors. The Rev. John Carroll died on the 21st June, 1905, having, by his will, appointed the defendants, the Rev. John Campbell and the Rev. Alexander M'Ateer, his executors.

A summons was issued by Daniel MacLaughlin for the purpose of determining whether the aforesaid bequests were valid and legal.

Serjeant Dodd, Henry, K.C., and *R. D. Megaw*, for the plaintiff.

Ronan, K.C., Bates, K.C., and *Kerr*, for the defendants.

Dudley White, for the Attorney-General.

THE MASTER OF THE ROLLS:—

The testator in this case, Mr. John Glenn, of Coleraine, made his will on May 18th, 1898. It is a very simple will.

He gives, devises, and bequeaths all his property, real and personal, of every description, of which he is possessed, or may be possessed at his death, to his trustees therein named, namely, to the Rev. John Carroll, Parish Priest of Saint Malachy's Church, Coleraine, and Diocese of Down and Connor, and Daniel MacLaughlin, solicitor, Coleraine, and County of Londonderry, and requests and directs them to apply it for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper. The first question is with reference to this gift, which, it is argued, is void in point of law for want of certainty, for it is said that while it would be a good gift if it were for such charitable purposes or for such religious purposes connected with the Roman Catholic Church, as the trustees might deem fit, there are no words in the will necessarily indicating a

M. R. 1906.

MAC LAUGHLIN v. CAMPBELL.

charitable or religious purpose, and, therefore, the gift is uncertain and void. The testator made several codicils to his will, the first of which is dated February 13th, 1903. In the five years which elapsed between the making of the will and of this codicil, it would appear that the testator had come to entertain doubts as to the validity of his will. He begins this codicil by leaving a number of pecuniary legacies to individuals, and other pecuniary legacies to Roman Catholic clergymen as trustees for charities, and proceeds to dispose of the residue as follows:—"As to the residue of my property I confirm my said will; but in the event of the disposition therein being held to be void for uncertainty, I bequeath the said residue to the Rev. John Carroll, P.P., Coleraine, for such charitable purposes in his said Parish as he shall think right, including the improvement and maintenance of the Catholic church there, and also the schools." He then appoints the Rev. John Carroll and Daniel MacLaughlin, solicitor, Coleraine, executors of his will. It has not been suggested that if the gift in the will is void for uncertainty, the gift of the residue in this codicil is not perfectly good; and it is satisfactory to know that in any event the testator's charitable intentions will not be frustrated.

On May 13th, 1903, the testator made another codicil, which was not proved, as it was revoked by a codicil of May 26th, 1903. The latter is as follows:—"I hereby revoke the codicil made by me on May 13th, 1903. I bequeath to the treasurers, for the time being, of Saint Vincent de Paul, of St. Malachy's, and St. John's, Coleraine, £50 each, to be expended by them for the benefit of the poor of their respective districts; I bequeath to my executor, Daniel MacLaughlin, of Coleraine, £2000, to be held by him upon trust, to be used by him as he in his discretion shall think best for the establishment in the Parish of Killowen or in the Parish of Coleraine of a Community of Christian Brothers, for teaching purposes, with full power to him to use the said money either for the purchase or renting of a site or buildings suitable for a school and residence, or for the building of a school or residence for said Christian Brothers, or towards their support or maintenance; and I hereby direct that said sums hereinbefore bequeathed shall be paid out of my pure personalty, and shall be a first charge thereon."

These were all his testamentary dispositions.

Two questions then arise for decision: first, is the gift of the property in the will good? If it is, the first codicil has no operation as to the residue.

Consider what the words which the testator has used are:— "to apply it for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper." The testator has used the words "Roman Catholic purposes" solely, without introducing the word "charitable" or "religious"; and it is contended that the gift is void for want of some such word. It is a mere question of construction, that is of the meaning to be put upon the words. I went as far as any Judge has gone in *Arnott* v. *Arnott* (1), following *White* v. *White* (2)—a case of authority which tends in favour of the view which I have always taken of endeavouring to carry out the intention of the testator. What was decided in *White* v. *White* (2) was that the Courts had come by a process of interpretation to construe a gift in a will for religious purposes as a gift for such religious purposes as were charitable; in other words, introducing the word "charitable" into the body of the gift. If I thought that that case applied here, I should follow it, and, indeed, I should be obliged to follow it. But that question does not arise here. There is no gift in terms for religious purposes. If there were, *White* v. *White* (2) would apply. If the gift is for purposes which may not be charitable, so that the trustees could apply it partly for one purpose and partly for another, or for either, they could apply the whole of it for a purpose which was not charitable, and the gift would, therefore, fail. There are many Roman Catholic purposes which are undoubtedly religious, as tending to the advancement or support of the Roman Catholic religion. For example, gifts for the endowment of a priest or curate, the building of a church or the maintenance of it, or supplying it with the proper appliances, musical or otherwise, schools, parochial houses, or presbyteries, &c. Such things may possibly have been in the mind of the testator when he made this will. I wish he had struck out everything except the direction to his trustees to apply his bounty for such purposes of Roman Catholic charities as they should think fit. But the words he used

(1) [1906] 1 I. R. 127. (2) [1893] 2 Ch. 41.

M. R. 1906. Mac Laughlin v. Campbell.

are "such Roman Catholic purposes"; and if there are Roman Catholic purposes which are not charitable, the case comes into the principle of *Morice* v. *The Bishop of Durham* (1), and the gift fails for uncertainty.

Several cases were suggested by way of illustration during the argument, as showing that, though properly termed strictly Roman Catholic purposes, it could not be said that the words "Roman Catholic purposes" necessarily involved purposes for the advancement or support of the worship and religion of the Roman Catholic Church as such. Mr. Ronan suggested that in a town, say the city of Belfast, there might be an agitation promoted for the purposes of redistributing the municipal wards of the town for strictly Roman Catholic purposes, so that the Roman Catholics should have their just proportion of representatives in each ward. Such an agitation would not be for a religious purpose: it would be for political purposes, as well as for Roman Catholic purposes. So with an agitation for the repeal of the Ecclesiastical Titles Act, or a movement to raise a force like the Papal Zouaves for the protection of the Pope against Garibaldi. Then, again, he put the case of the body called The Catholic Association, which is alleged to have been recently established in Ireland for the purpose of promoting exclusive dealing between Roman Catholics. That was not a religious purpose, yet it was a Roman Catholic purpose. Mr. Ronan went further than he needed in search of an illustration when he suggested that there might be a movement to re-introduce the Inquisition into Ireland; but that may perhaps be left out of consideration. I put the case during the argument of a scheme to establish a club in Coleraine for Roman Catholics. That would be a strictly Roman Catholic, but it could not be called a charitable or religious object. I think that there were good grounds for the doubt which was entertained as to the validity of this gift, and that it is void for uncertainty. It is satisfactory, however, as I said before, that in the codicil, which was made five years after the will, there is a disposition for charitable purposes which cannot be attacked. It names executors, gives pecuniary legacies, and is a complete disposition of all the testator's property.

(1) 10 Ves. 521.

The other question arises on the gift in the codicil for establishing a community of Christian Brothers in the parish of Killowen for teaching purposes. I have already read the words of the gift. If there was any doubt as to what the testator meant by Christian Brothers, I would have done what I did in other cases, namely, referred it to Chambers to inquire what the constitution of the Christian Brothers was. But that appears from the report of the case of *Murphy* v. *Cheevers* (1) before the Vice-Chancellor, and it would be absurd to put the estate to the expense of such an inquiry. The Christian Brothers, as everybody knows, are bound by monastic vows. They are engaged mainly in teaching, and do very valuable service as teachers; but the law says that a gift to them is void under the Roman Catholic Emancipation Act, being a bequest to a body who are bound by monastic vows. That objection is raised against the gift in the present case. The question is, Is a gift to establish a community of Christian Brothers as commonly understood illegal? Serjeant Dodd argued that the words "for teaching purposes" which follow showed what was in the testator's mind; that he did not care whether it was a community of Christian Brothers proper, or any community of persons who might be Christians, and in a sense Brothers, and so might be called Christian Brothers though not bound by monastic vows, so long as it existed for educational purposes. But obviously the gift is not susceptible of that meaning. No case has gone so far as to declare that a gift to a monastic order for teaching purposes is a valid gift. There have been cases of gifts to the Principal of an Order which have been held good; but that was because the gift was to him as an individual. But there is no case deciding that a gift, for example, to a Franciscan monastery for teaching purposes is good. Mr. Molony says that there are two kinds of Christian Brothers in this country: (1) the old Irish Christian Brothers, who are bound by monastic vows; and (2) the Christian Brothers who came over from France some twenty-five years ago, and established themselves in this country. He says that he does not know (and he has excellent

(1) 17 L. R. Ir. 205.

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means of knowledge) whether they are bound by monastic vows. This would involve an inquiry, the most favourable result of which would be that it might turn out that these French Christian Brothers were not bound by monastic vows. If such were the case, there would have to be a choice made by the trustees between the two sorts of Christian Brothers; but *Morice* v. *Bishop of Durham* (1) and such cases show that the whole thing would then be uncertain, and therefore the gift void. A legacy to John Smith or James Smith—there being two such people—is uncertain and void. But it is quite plain that though teaching purposes are referred to, the trustee has power to use the money to purchase or rent a site or building for a school or residence for the Christian Brothers: that may mean Christian Brothers engaged in teaching; but then come the words "or towards their support or maintenance." These words can only mean the support and maintenance of the Christian Brothers. This gift, then, is illegal as well as uncertain; and the result is the gift fails, and is not binding on the assets of the testator. But I may add, though the matter is not strictly before me on this summons, that as there is a valid disposition of the residue in the prior codicil, this £2,000 will form part of that residue, and will be applicable under it for purposes properly charitable, and directed by the testator himself.

The answer to the first question will be "No"; to the second, "Yes"; to the fourth, "No"; to the third I give no answer at present.

W. L.

Appeal. June 20.

The plaintiff appealed (2).

Serjeant Dodd, *Henry*, *K.C.*, and *R. D. Megaw*, for the appellant:—

This is a good charitable bequest, and must be taken to mean

(1) 10 Ves. 521.

(2) In the Court of Appeal, before Sir Samuel Walker, C., and Fitz-Gibbon and Holmes, L.JJ.

for the benefit of the Roman Catholic Church. In *Arnott* v. *Arnott* (1) it was held that a gift for "religious purposes" meant religious purposes which were charitable, and that the bequest was not void for uncertainty. A bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a charitable purpose: *White* v. *White* (2). This gift is not void for uncertainty, once it is taken in the sense of a gift for the Church of Rome; and is distinguishable from *Grimond* v. *Grimond* (3), where the trustees might select the charitable or religious societies to which the money might be paid.

Ronan, K.C., *Bates, K.C.*, and *Kerr*, for the respondents:—

There is nothing in the will to restrict this gift to purposes which are strictly charitable; and once you bring in objects which are not strictly charitable, the gift is void: *McDuff* v. *McDuff* (4); *Re Allen* (5).

SIR SAMUEL WALKER, C.:—

We are all of opinion that the judgment of the Master of the Rolls is right. The question at issue, having regard to the alternative gift in the codicil, appears to me to be purely academic, and a bequest in such a bald form is hardly likely to occur again; but, of course, the parties are entitled to have the decision of the Court on the matter.

There are two rules which we must observe. In the first place, as this is a question of construction only, we cannot allow any extrinsic ideas of our own as to the intention of the testator to influence us in interpreting his will; and, secondly, there is the rule, well settled since the time of Lord Eldon, that if, upon the true construction of the will, a bequest thereby given could be applied according to alternatives stated to some purpose other than a charitable purpose in the legal sense of the term, the gift, as a whole, is not a charitable gift. The way it was argued here by Serjeant Dodd and Mr. Henry was that we ought to read this

(1) [1906] 1 I. R. 127.
(2) [1893] 2 Ch. 41.
(3) [1905] A. C. 124.
(4) [1896] 2 Ch. 451.
(5) [1905] 2 Ch. 400.

Appeal. 1906. Mac Laughlin v. Campbell. Sir Samuel Walker, C.

will as if the bequest were "for the purposes of the Roman Catholic Church"; but we cannot import into the will words which it does not contain. I do not express any opinion on the abstract question—whether if the gift were for "religious purposes" that would make it charitable. Much might be said in support of an argument to the contrary. Some particular Order of Nuns, for instance, might come within the terms of such a bequest, and yet not be a charity in the eye of the law. But these are not the words of the bequest here: it is a bequest "for Roman Catholic purposes," and, as the Master of the Rolls said, it might be applied for some purpose other than a charitable purpose, and, therefore, in principle this case is ruled by *Morice* v. *Bishop of Durham* (1), and the appeal must be dismissed.

Fitz Gibbon, L.J.:—

I concur. The question is—whether the gift is sufficiently definite to make it a gift exclusively in favour of charitable objects. The testator himself had doubts on the point, because he provided for the contingency of its invalidity by the codicil—

> "As to the residue of my property, I confirm my said will; but in the event of the disposition therein being held to be void for uncertainty, I bequeath the said residue to the Rev. John Carroll, P.P., Coleraine, for such *charitable purposes* in his said parish as he shall think right, including the improvement and maintenance of the Catholic church there, and also the schools."

There can be no doubt that the words in the will, in their ordinary sense, would include some objects which are illegal by statute, *e.g.* monastic communities. I should not like to defeat the gift on that ground, if it were otherwise charitable. But the question remains whether the words which define the objects necessarily confine the testator's bounty to objects which come within the legal definition of charity. If not; if the testator has in effect said—"I leave it to the discretion of my trustees to give the money to objects which may or may not be charitable," the gift is void for uncertainty; not because it might not be applied to religious,

(1) 10 Ves. 521.

useful, or benevolent purposes, but because it might be expended upon objects not essentially charitable in the legal sense.

This will, in point of uncertainty, goes beyond anything yet held valid. The only defining words are "Roman Catholic purposes." The trustees are not even exclusively clerical: one was a parish priest, but the surviving trustee is a solicitor.

What limitation do the words "Roman Catholic" import? In my opinion they can have no more restrictive effect than that of describing a particular religious denomination. Whatever effect is given to them must also be given to words describing any other form of religious belief. The words Protestant, Presbyterian, Methodist, or Nonconformist, must be interpreted on the same principle. Passing over the illegality of some Roman Catholic purposes, we find case after case deciding that every religious purpose is not necessarily charitable; and we have also decisions binding on this Court that all philanthropic or benevolent objects are not necessarily charitable. *White* v. *White* (1) was cited to show that a bequest for "religious purposes" was, *prima facie*, a bequest for "charitable purposes." I think that decision must be supported, if at all, by importing the element of public benefit, which the Chief Baron has held to be essential to a "charity," as distinguished from a merely *pious* or religious object.

In his argument, Serjeant Dodd brought in the word "Church," which is not in the will. If that word had been used, it would have been necessary to consider the sense in which the testator used it. It has two distinct meanings: it may mean the aggregate of the individual members of the "Church"; or it may mean the quasi-corporate institution which carries on the religious work of the denomination whose name it bears. If the gift were made to "the Church," *e.g.* the "Church of Rome" or the "Church of Ireland," I should think that it would import—at least *prima facie*—the operative institution which ministered religion and gave spiritual edification to its members; a gift in such terms would exclude objects which would be included in a gift for the "purposes" of the individual members of a religious body.

The question is—Can we exclude from the purposes of any

(1) [1893] 2 Ch. 41.

Appeal. 1906.

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religious denomination every purpose that is not charitable? Denomination is only *Sect* "writ large." There are, beyond question, many purposes peculiar to every religious denomination, which are not charitable. In many cases investigation has been made, and inquiries have been directed, to determine whether Roman Catholic institutions, specially mentioned in wills, were or were not charitable. They were undoubtedly "Roman Catholic," and the gifts to them were undoubtedly gifts for "Roman Catholic purposes"; yet many of them have been held invalid.

On these grounds, I hold that this gift is void; and I think that it would revolutionize the law of charitable gifts, if we were to decide that the introduction of a denominational epithet necessarily made a gift charitable.

HOLMES, L.J.:—

The question in controversy in this appeal has during the argument raised in my mind some doubts which even now have not been altogether removed. If, on the true construction of the will, I were to hold that Roman Catholic purposes are to be understood as the purposes of the Roman Catholic Church, I should not hesitate to decide that the legacy was to be used for teaching the doctrines of that Church, and supporting its worship and services, in which case it would be clearly charitable. But while this is a possible construction, I am disposed to think that it is too narrow. Roman Catholic purposes may include any purpose connected with Roman Catholicism, and extend to purposes which, although pious, philanthropic, and benevolent, would not be charitable. That this was the view of the testator himself, or his advisers, is shown by the first codicil. The testator indicates a fear that the bequest of the residue in the will might be void for uncertainty, which must mean uncertainty as to the purposes for which it is to be applied; and, accordingly, he directs in the alternative that it is to be applied for such charitable purposes in the parish as the trustee shall think right, including the improvement and maintenance of the Catholic Church there, and also the schools—admittedly a good charitable bequest. I do not say that the doubts of the testator are conclusive, but they indicate that, in

his opinion, the language of the will might extend to purposes which the law does not consider to be charitable.

Solicitor for the plaintiff: *W. Jasper Brett.*
Solicitor for the defendants: *P. J. Magee.*

R. D. M.

THE LURGAN URBAN DISTRICT COUNCIL *to* MOORE AND JOHNSTON (1).

Appeal. 1906. June 18, 27.

Practice—Costs—Taxation—Chancery or Parliamentary scale—Provisional Order of Local Government Board—Housing of Working Classes Act, 1890 (53 & 54 Vict. c. 70).

The costs incidental to procuring a Provisional Order from the Local Government Board under the Housing of the Working Classes Act, 1890, are taxable on the Parliamentary scale.

THE Lurgan Urban District Council promoted a scheme under the provisions of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), for the improvement of Hawkins Court, in the town of Lurgan (being an unhealthy area), and this scheme was entitled "The Lurgan Town Provisional Order, 1897 (No. 2)." This Order was confirmed by Act of Parliament on the 15th July, 1897 (60 & 61 Vict. c. lxxxii.).

Previously to the initiation of the scheme, Messrs. Moore & Johnston, the solicitors for the Urban District Council, applied to the Local Government Board (whose consent to the scheme was necessary) for instructions as to the manner in which the same should be carried out, and received a pamphlet of instructions specifying the requirements of the Local Government Board and of the Parliamentary Standing Orders.

Moore & Johnston having furnished their bill of costs to the Urban District Council, the latter required to have it taxed. The charges objected to consisted of items 1 to 121 of the bill, being items relating to the preparation of copies of, and attendances

(1) Before SIR SAMUEL WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1906.

LURGAN U. D. C. *to* MOORE & JOHNSTON.

incident to, the statutory notices, advertisements, books of reference, applications and notices to owners, declarations, scheme, petition, statement and other documents, and attendances necessary to the formulation of the scheme and inquiry leading up to the Provisional Order. These items were all charged on the Parliamentary scale.

On the case coming before the Taxing Officer, he refused to tax them on the ground that he had no jurisdiction to tax Parliamentary costs. On being pressed to tax them, in order that the question should be decided, he taxed them according to the Irish Chancery scale. The objections of Moore & Johnston were as follows :—

1. That as a Taxing Master of the High Court of Justice in Ireland he has ample jurisdiction to tax, on the Parliamentary scale of charges, the costs incurred and included in the said items of said bill, which are costs taxable and allowable on that scale.

2. On the ground that work done preliminary to, and essential for, and in connexion with, the promotion of a Provisional Order requiring Parliamentary confirmation is taxable and allowable under the Parliamentary scale of charges.

3. On the ground that the entire of the work done and charged for by the said items is Parliamentary work, as defined by and coming within the scale of charges for Parliamentary work, and in connexion with work done preliminary to, and absolutely essential for, and in connexion with, the promotion of a Provisional Order and confirming Bill in Parliament, and therefore coming within the provisions of the House of Commons Taxation Acts and of the Parliamentary Schedule of Fees.

The report of Master Goff, the Taxing Officer, stated—

"The bill of costs referred to (Nos. 1 to 121) purports to be for business done 'In Parliament,' and the costs and requisition to tax are so headed.

"The business appears to have been done in Ireland. When the bill of costs came before me on summons for taxation, an objection was made to my taxing by the solicitor opposing, on the ground that I had no jurisdiction or authority to tax Parliamentary costs, but that if I did proceed to tax, I should tax and make allowances only according to the scale of charges and fees in force and used in Ireland.

"After consulting with my colleagues, I considered that I had no jurisdiction to tax the bill as Parliamentary costs, and accordingly declined to proceed with the taxation of the bill. But I was asked by

the solicitors to tax the costs under whatever scale or in what manner I thought right, so as to enable them to raise, by objections to the taxation, the question whether I had jurisdiction to tax, and should have taxed, the bill as made out according to the Parliamentary scale. It was urged that there was not any other convenient way to enable the solicitors to get a decision on the question. I therefore proceeded to tax the bill, on notice to the solicitors opposing the costs, and on their attendance taxed the costs according to the Irish Chancery scale, and the taxation was completed accordingly.

"The foregoing objections were then brought in to the taxation, and, after hearing the solicitors, I overruled the objections, on the ground that I had no jurisdiction or authority to tax the bill as Parliamentary costs, and that I had taxed according to the scale of fees and charges used and in force in Ireland, usually referred to as the Chancery scale."

Messrs. Moore & Johnston applied to the Master of the Rolls for an order to review the taxation; for a declaration that the Taxing Master had jurisdiction to tax such costs on the Parliamentary scale of charges; and for directions to the Taxing Master accordingly. On the 1st of May, the Master of the Rolls, agreeing in the view taken by the Taxing Master, refused the motion. Messrs. Moore & Johnston appealed.

S. L. Brown, K.C., and *Pigot*, for the appellants:—

We submit that the Taxing Officer has jurisdiction, and that the costs should be taxed on the Parliamentary scale.

In consequence of the decision in *Re Morley* (1), the costs of applications to the Board of Trade for Provisional Orders should be taxed on the Chancery and not on the Parliamentary scale. These costs were held not to be Parliamentary costs at all. In consequence of that decision the Act 42 & 43 Vict. c. 17 was passed, which gave jurisdiction to the Taxing Officer of the House of Commons to apply to Provisional Orders the same taxation as Private Bills. *Prima facie*, it required an Act of Parliament in each case to give jurisdiction to the Taxing Officer. But once the Taxing Officer had the jurisdiction under the Act of 1847 (10 & 11 Vict. c. 69), or the Act of 1879 (42 & 43

(1) L. R. 20 Eq. 17.

Appeal. 1906. LURGAN U. D. C. *to* MOORE & JOHNSTON.

Vict. c. 17), he could tax on the Parliamentary scale costs of Parliamentary work done by a solicitor. The Taxing Officer of the Court of Chancery had a concurrent jurisdiction with the Taxing Officer of the House of Commons in any bill of costs which was a mixed bill: *Re Sudlow* (1); *Re Strother* (2). These cases were all considered in a recent case of *Re Baker, Lees, & Co.* (3), where it was decided that the mere fact that the appellants were solicitors did not render their bill of costs for Parliamentary work liable to taxation under the Solicitors Act, 1843. Where there is a mixed bill of costs, the English Taxing Officer frequently taxes on the Parliamentary scale.

The items in the bill of costs from 1 to 121 were for work done preliminary to obtaining a Provisional Order; it was necessary to employ a Parliamentary agent to prove compliance with Standing Orders; the costs incurred by such Parliamentary agent are the subject-matter of a separate bill, which can only be taxed by the Officer of the House of Commons.

Matheson, K.C., and *D. M. Wilson*, for the Lurgan Urban District Council:—

This was not Parliamentary work, but work done previously to obtaining the Provisional Order. The bill of costs was a mixed bill, and the work for which the costs are charged was all done in Ireland. The Taxing Officer had no jurisdiction to tax the bill, and if he had, he should have taxed it on the Chancery scale. *Re Baker, Lees, & Co.* (3) does not apply. It was there held that where a bill of costs, delivered by a Parliamentary agent, who was likewise a solicitor, related exclusively to business done by him in the capacity of a Parliamentary agent, and not in that of a solicitor, the bill of costs could not be referred for taxation under the Solicitors Act of 1843. The costs in this case are not Parliamentary costs.

(1) 11 Beav. 400. (2) 3 K. & J. 518. (3) [1903] 1 K. B. 189.

Appeal.
1906.

LURGAN U. D. C. *to* MOORE & JOHNSTON.

June 27.

SIR SAMUEL WALKER, C. :—

Messrs. Moore & Johnston are the local solicitors for the Lurgan Urban District Council, and as such were employed in connexion with a scheme for the improvement of a certain unhealthy area in Lurgan, under the Housing of the Working Classes Act, 1890. The scheme was the subject of a Provisional Order, and the Order was confirmed by Act of Parliament on the 15th July, 1897. Under the rules of the Local Government Board, it was necessary to serve notices on owners and occupiers. There was a Parliamentary agent employed in London also, and a bill sent in by him was paid. A bill of costs was furnished by the solicitor to the Council, which included costs for Parliamentary work, and which, no doubt, could be taxed by the Taxing Master of the House of Commons; and there was a requisition to tax, and the costs came before Master Goff for taxation. An objection was made before the Taxing Officer to his taxing, on the ground that there was no jurisdiction in Chancery to tax Parliamentary costs; and that if he did tax the costs, he should do so according to the scale of charges applicable to such work for business done in Ireland. The Taxing Master considered he had no jurisdiction, but for the purpose of raising the question he taxed 121 items of the bill, according to the scale of taxation applicable, I believe, in Chancery, and much lower than if the Parliamentary scale was applied. Objections were brought in, and the Taxing Officer overruled them, on the ground that he had no jurisdiction to tax the bill as Parliamentary costs. There was an appeal to the Master of the Rolls, and he decided that the Taxing Officer had no jurisdiction to tax on the Parliamentary scale. The solicitor appealed, and asked that that order should be reversed, and that it might be ordered that the taxation of items 1 to 121 of the costs herein by the Taxing Master be reviewed, and that it be declared that the said Master has jurisdiction to tax such costs on the Parliamentary scale of charges, and that the said bill be referred back to the Taxing Master with a direction that the same, so far as relates to the said items, be taxed according to the Parliamentary scale.

After the appeal had been discussed before us, it appeared to us desirable to obtain the opinion of the Taxing Officer of the Supreme Court in England as to the practice there, and in answer

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Sir Samuel Walker, C.

to a letter from our Registrar, dated the 18th June, we have been furnished with a letter, from the Master in England, stating the practice :—

"SUPREME COURT TAXING OFFICE,

"ROYAL COURTS OF JUSTICE,

"22*nd June*, 1906.

"DEAR SIR,—Your letter of the 18th inst. has been considered by the Taxing Masters, and I now beg to reply to your questions, as follows:—

"It is the practice of the Taxing Masters to tax charges for Parliamentary business forming part of a solicitor's bill of costs brought before them for taxation. Our jurisdiction to do so has not, to my knowledge, been challenged upon taxation, nor do I think that it could be where the solicitor's bill is a mixed bill, consisting partly of general charges and partly of charges for Parliamentary work. See *Re Baker, Lees, & Co.* ([1903] 1 K. B. 189); see also, as to the jurisdiction to order taxation, *Re Strother* (3 K. & J. 518), and, as to the practice of the Taxing Masters, *Re Sudlow and Kingdom* (11 Beav. 400).

"Upon such a taxation we apply the Parliamentary scale to work falling within it. It is immaterial that the Parliamentary agent has also a bill of costs, and that he might insist on his right to have his bill taxed by the Parliamentary Taxing Officer (*Re Baker, Lees, & Co.*). We do, in fact, not infrequently tax the Parliamentary agent's charges as a matter of convenience, but more often it is the solicitor's bill for his part of the work which comes before us.

"The 'List of Charges,' issued by authority in both Houses, gives two scales, one for Parliamentary agents, the other for solicitors. I enclose prints of the 'List of Charges' under the House of Commons Costs Taxation Act, 1847, and the House of Lords Costs Taxation Act, 1849.

"Under the House of Commons Taxation Act, 1879 (42 & 43 Vict. c. 17), the provisions of the Act of 1847 are extended to the costs, charges, and expenses of Parliamentary agents and solicitors in respect to the obtaining of Provisional Orders and Bills confirming them.

"2. It follows that for business of this character the solicitor is entitled to charge, and to have his costs taxed on, the Parliamentary scale.

"In the case of mixed bills the charges for miscellaneous business are taxed on the ordinary or non-Parliamentary basis, and those relating to Parliamentary proceedings (including work covered by the Act of 1879) on the Parliamentary scale. We do not experience much difficulty in dealing with the two classes of charges. Sometimes we refer

the Parliamentary items to the Parliamentary Taxing Officer upon request to tax them for us; but generally we deal with them ourselves on the lines I have indicated.

"Yours faithfully,

"W. F. BAKER, *Master.*"

This letter answers all the points on which we desired information. We consider it desirable that the practice should be uniform in the two countries. It is a convenient one, and we see no reason why the Irish solicitor should not be placed on the same footing as English solicitors. Accordingly, we shall allow the appeal, and remit the bill of costs to the Taxing Officer, with a declaration that he has jurisdiction to tax, and directing him to do so, according to the Parliamentary scale.

FITZ GIBBON, L.J.:—

Two questions—not the same, but similar—have been argued in this matter. It is satisfactory that the result will be to assimilate the Irish practice with the English, and to secure for Irish solicitors, who tax their costs here, the same remuneration which they would obtain at Westminster.

The first question which was raised by the Taxing Officer was whether he had any "jurisdiction" to tax "Parliamentary costs." In one sense these are not Parliamentary costs: they were not incurred by a Parliamentary agent, nor were they incurred for work done before Parliament. But in another sense they are Parliamentary costs, being costs incurred by a solicitor in reference to Parliamentary business, and the standing orders give the Parliamentary Taxing Officer jurisdiction to tax them upon the Parliamentary scale when they are brought before him. Is his jurisdiction exclusive? If not, is the Taxing Officer of the High Court at liberty (or bound) to tax them upon the same scale which the Parliamentary Taxing Officer would apply to them? It would be strange if the remuneration for the same work should differ before different authorities, or if the rights of solicitors of the Supreme Court in Ireland, in the case of "mixed bills," should be different from those of English solicitors. The report of the English Taxing Master is explicit, both as to the practice and the jurisdic-

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Fitz Gibbon, L.J.

tion. Though the English Masters sometimes refer "Parliamentary items" to the Parliamentary officer, that is only done by request, and by way of asking help from an expert; but the jurisdiction, duty, and responsibility still remain with the Master, who generally deals with the costs himself, and who ultimately, whether he gets help or not, signs and certifies the bill.

In England, in the case of mixed bills, the miscellaneous items are taxed on the non-Parliamentary basis, and the Parliamentary scale is applied to all items which are included in it. I can see no reason why the Irish Taxing Officers should not have the same jurisdiction, or should not follow the same rules and practice, which prevail in England. Surely, the knowledge and the official equipment of our Taxing Officers should enable them to apply the Parliamentary scale, when taxing mixed bills, to those items of solicitors costs which are included in that scale, and to which the co-ordinate authorities apply it in England. The "Chancery scale" or the "Common Law scale" no more applies to "Parliamentary items" here than it does in England. In mixed bills different classes of items are taxable on different scales. It is for the Taxing Officer to determine which scale applies to each item; but, substantially, our decision is that the Parliamentary scale is the document which fixes the rate of remuneration for work which comes within it. And that is equally so whether the taxation takes place east or west of St. George's Channel.

It is in every way desirable that Irish business should be done in Ireland, and our decision will put an end to any pecuniary motive for sending it over to England.

HOLMES, L.J., concurred.

Solicitors for the applicants: *Moore & Johnston.*

Solicitors for the Lurgan Urban District Council: *Lyness & Hayes.*

R. D. M.

IN RE FORD AND FERGUSON'S CONTRACT (1).

M. R. 1906. July 31.

Conveyance—Construction—Words of limitation—Habendum to grantee—Supplying omission of words of limitation by interpretation clause—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 51.

Under sect. 51 of the Conveyancing and Law of Property Act, 1881, in a deed, in order to pass the legal estate in fee simple, it is necessary, in the absence of the word "heirs," to use the actual words of limitation mentioned in the section, namely, "in fee simple."

Therefore, where, after the passing of the Act, freehold land was expressed to be granted "unto the grantee . . . unto and to the use of the grantee for ever," and where the deed contained an interpretation clause in the description of the parties to the deed, by which the word "grantee" was, unless a contrary intention appeared, to be read as "grantee and his heirs and assigns":—

Held, that (apart from any question of specific performance or rectification) the words of limitation could not, consistently with the context, be read into the habendum, and that the legal estate in the fee simple did not pass.

VENDOR'S SUMMONS, under the Vendor and Purchaser Act, 1874.

James Ford was possessed of the lands, the subject-matter of the present summons, under a conveyance which (so far as it is material to the present report) was as follows:—

"This indenture, dated 13th October, 1892, between Thomas Sinclair, of Belfast, in the county of Antrim (who, and his heirs and assigns, unless the contrary intention appears, are hereinafter called the grantor), of the one part, and James Ford, of Belfast aforesaid, engineer (who, and whose heirs and assigns, unless the contrary intention appears, are hereinafter called the grantee), of the other part, witnesseth, that in consideration of the sum of £310 to the grantor paid by the grantee . . . and of the rent and covenants hereinafter reserved, and conditions, he, the grantor, doth hereby grant unto the grantee all that and those (parcels), to hold the said hereditaments and premises, with the appurten-

(1) Reported by Mr. D. M. Steen.

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ances unto and to the use of the grantee for ever, yielding and paying therefor and thereout yearly and every year unto the grantor . . . And the grantee hereby covenants with the grantor (covenants for payment of rent, and maintenance of repairs, and provisions for re-entry) . . . And the grantee hereby covenants with the grantor, that he, the grantee, will not (restrictive covenant against trades). And the grantor hereby covenants with the grantee that he, the grantor (covenant for payment of headrent). And also that he, the grantee, paying the said reserved yearly rent, and observing the conditions hereinbefore contained, shall and may peaceably occupy and enjoy the said hereby-granted premises, and every part thereof, without the let, hindrance, interruption, or disturbance of the grantor, or any person claiming or deriving from or under him, them, or any of them. In witness, &c."

James Ford died on 14th October, 1900, intestate, and his estate was administered under the Court. During the administration the vendor, John Lemon Ford, was declared heir-at-law of his father, and on 3rd October, 1905, entered into and since remained in receipt of the rents and profits of the said real estate, under the said conveyance of October, 1892.

On 28th June, 1906, John Lemon Ford entered into a covenant with Anna Maria Ferguson, the purchaser, to sell the premises comprised in the said conveyance of 13th October, 1892, at the price of £320, and subject to conditions of sale, and was paid the sum of £20 as a deposit and part payment of the purchase-money. The purchaser, by her requisitions, raised the objection that the fee-farm grant of 13th October, 1892, was defective, inasmuch as the word "heirs" had been omitted in the habendum, and required a supplemental deed to be executed. The vendor having declined to comply with the said requisition, the purchaser refused to accept the title or proceed with the purchase. The vendor then brought the present summons in the matter of the Vendor and Purchaser Act, 1874, for a declaration that the fee-farm grant, dated 13th October, 1892, was a good, valid, and subsisting grant, and passed a freehold estate in the premises to the heirs and assigns of James Ford, the grantee in said indenture of fee-farm grant, notwithstanding the omission of the words

"heirs and assigns" in the habendum thereof, and for an order that the objection of the purchaser to the title of the vendor had been sufficiently answered by the vendor, and that a good title to the lands had been shown in accordance with the particulars and conditions of sale.

J. S. Edge, for the vendor:—

It is not necessary that the actual word "heir" should appear in the habendum. What you want is an express reference to words which limit an estate: Preston on Estates, vol. ii., p. 1; *In re Bird's Trusts* (1). The Court will read the deed as rectified: *Fitzgerald* v. *Fitzgerald* (2); *Annesley* v. *Annesley* (3). Without any rectification this deed carries the fee: *The Attorney-General* v. *Corporation of Worcester* (4).

Littledale, K.C., for the purchaser:—

The purchaser is entitled to a legal, not merely an equitable, fee. You cannot look at the recitals to construe the habendum: Key and Elphinstone (8th ed.), vol. ii., p. 63; *In re Ethel and Mitchell and Butler's Contract* (5); *Irwin* v. *Parkes* (6).

J. S. Edge, in reply:—

"Grantee" is, by the interpretation clause, to be taken as "grantee, his heirs and assigns." An estate can be limited by reference: Comyn's Digest, vol. iv., p. 6.

THE MASTER OF THE ROLLS:—

This is one of the cases in which there can be no question as to the intention of the parties to the deed; and if the matter came before the Court in an action for specific performance or rectification, there would be no difficulty in rectifying or reading into the habendum the words of the interpretation clause. But such relief is outside the scope of a vendor and purchaser summons. This is a case where the desire for novelty or economy has brought

(1) 3 Ch. D. 214.
(2) [1902] 1 I. R. 477.
(3) 31 L. R. Ir. 457.
(4) 15 L. J. (N. S.) Ch. 398.
(5) [1901] 1 Ch. 945.
(6) [1904] 2 Ch. 752.

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about bad conveyancing. If there were any authority for holding that, in a case like the present, terms of art could be dispensed with, I would yield to it; but no such case has been cited. In the present deed there is an interpretation clause--[His Lordship read the clause]; but that clause cannot alter the English language. The words are not "the grantor" or "the grantee" merely. "*He*, the grantor," means the grantor only, and "he, the grantee," means and can mean the grantee only. It is impossible to incorporate by reference the whole of the interpretation clause, having regard to the use of the words. On the face of the conveyance there is a want of the terms which are essential to the instrument itself. It is far safer to abide by the rule laid down in Key and Elphinstone, and, in the absence of the word "heirs," to use the actual words mentioned in the section, "in fee simple."

There is no hardship in the present case, as the grantor is living, and there will be no difficulty in rectifying. Under the circumstances, I cannot say that the objections of the purchaser have been sufficiently answered and a good title shown. Costs must follow the result.

Solicitors for the vendor: *M'Cormick & Quail* (1).
Solicitors for the purchaser: *W. E. Armstrong & Sons.*

D. M. S.

(1) These gentlemen wish it to be stated that they were not concerned in the preparation of the deed in question.—[Ed.].

JAMES BRUCE AND SAMUEL BRUCE *v.* MARY E. BROPHY.

(1905. No. 614.)

Practice—Mortgage—Foreclosure without sale—Special circumstances—Bonus.

Barton, J.
1905.
Dec. 9, 16.
Appeal.
1906.
May 8.

The Chancery Division has jurisdiction to decree foreclosure and not a sale in a mortgagee's suit, but will only exercise such jurisdiction under exceptional circumstances.

The plaintiffs, in an undefended mortgagees' suit, sought a decree that, in default of payment of the principal and interest secured by the mortgage on a day to be named, the defendant should stand foreclosed of all right or equity of redemption in the mortgaged premises.

The mortgage was made to secure the entire of the purchase-money of the lands, which had been advanced by the mortgagee to the mortgagor. The plaintiffs alleged that the rents were insufficient to keep down the interest on the mortgage debt; that the proceeds of a sale at twenty-five years' purchase would be insufficient to discharge the said debt, even if the plaintiffs became entitled to the bonus on a sale to the tenants (which was the avowed object of seeking foreclosure), and that there was no other mortgage affecting the premises:—

Held, by Barton, J., and by the Court of Appeal, that these circumstances were not sufficient to justify the Court in departing from its settled practice to order a sale and not foreclosure.

MOTION for judgment on the default of the defendant in entering an appearance and delivering a defence in a mortgagee's suit.

By a Landed Estates Court conveyance, dated the 13th day of March, 1868, the lands of Alexanderade and Belis, in the county of Meath, containing 56A. 1R. 9P., were conveyed to one William Brophy, in fee-simple, subject to the sum of £1400 advanced by William Robert Bruce to the said William Brophy, to enable him to purchase the said lands; and by an indenture of even date with the said conveyance, and made between the said William Brophy of the one part, and the said William Robert Bruce of the

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other part, the said lands were granted by the said William Brophy to the said William Robert Bruce, by way of mortgage, to secure the repayment of the said sum of £1400, with interest thereon at 6 per cent. per annum.

The said William Brophy died intestate on the 7th day of October, 1880, leaving the defendant, his daughter and only child and heiress-at-law. The said William Robert Bruce died on the 25th day of June, 1902, having by his will, dated the 9th day of August, 1898, devised and bequeathed all his property, real and personal, to the plaintiffs, on the trusts therein mentioned, and appointed the said plaintiffs executors of his will, probate of which was duly granted to the plaintiffs.

By their statement of claim, filed in lieu of delivery, the plaintiffs alleged that the whole of the said sum of £1400, together with £207 5*s.* 1*d.* for interest down to the 13th September, 1905, was due by the defendant on foot of the mortgage; that the rents of the lands (which were collected by a receiver appointed under deed by the said William Robert Bruce), in consequence of the reduction thereof under the Irish Land Acts, had become insufficient to pay and keep down the interest accruing on the said mortgage debt, and that the defendant had failed to pay the said mortgage debt, or to release the equity of redemption of the lands, though requested to do so.

The plaintiffs claimed that the said sum of £1400, with £207 5*s.* 1*d.* for interest, might be ascertained as due and owing to the plaintiffs on foot of the said mortgage, together with further interest until payment, or that an account might be taken of what was due for principal and interest on foot of the mortgage, and that, in default of payment to the plaintiffs of the sum so ascertained to be due, together with their costs of suit, by a day to be named by the Court, "the defendant and all persons claiming under her might be absolutely foreclosed of all equity of redemption in or to the said mortgaged premises."

The defendant did not appear, and the averments in the statement of claim were verified by affidavit.

G. Y. Dixon, for the plaintiffs.

BARTON, J.:—

This is a motion for judgment in default of appearance in a mortgagee's suit. It appears that the late Master Bruce advanced to the late William Brophy £1400, to enable Brophy to purchase certain lands of Alexanderade and Belis, in the county Meath; and Brophy, by indenture of mortgage, dated 13th March, 1868, mortgaged the lands to Master Bruce, to secure the repayment of the £1400. Both mortgagor and mortgagee have since died. The plaintiffs are the executors of Master Bruce's will. Defendant is the only daughter and heiress-at-law and sole next-of-kin of Brophy. Mr. Dixon applies on behalf of the plaintiffs, that in lieu of the decree for sale, which it is the Irish practice to give in these cases, usually called a decree for "foreclosure and sale," there should be a simple decree for foreclosure. Plaintiffs wish to get the bonus as vendors under the recent Land Act, and it is on that account that they ask for relief by foreclosure instead of sale.

In Ireland it has always been the recognized practice to give relief to mortgagees by sale, and not by foreclosure. I may refer to *Loughran* v. *Loughran* (1), where the Vice-Chancellor said that the relief given to mortgagees was, in Ireland, always by sale, and not by foreclosure, and the decree in all such cases provides for the payment of all incumbrances, according to priority. The settled practice of the Irish Courts in this respect is so well recognized, that where a mortgagee's suit is instituted in England in respect of a mortgaged estate situate in Ireland, the relief is sought and given by way of sale instead of foreclosure: see Coote, p. 1036. In *Wilson* v. *Dunsany* (2) Sir J. Romilly referred to the settled form of such Irish decrees, and discussed their effect, pointing out that they were not regarded as judgments for the payment of a sum of money, but in principle stand on the same footing as foreclosure decrees, differing only in the form of relief given.

That case is not a case of authority upon the question of domicil, which it decided. But the observations of Sir J. Romilly as to the practice in Ireland and the effect of Irish decrees have not,

(1) 15 L. R. Ir. 71, at p. 75. (2) 18 Beav. 293, 299.

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so far as I know, been affected by any subsequent case. The practice of giving relief in these cases by sale instead of foreclosure also exists in several of the Colonies. In *Gordon* v. *Horsfall* (1) Mr. Pemberton Leigh gave the decision of the Privy Council in an appeal from Jamaica, where the practice of the Chancery Courts was to decree sale instead of foreclosure. At p. 426 he referred to the Irish practice, and apparently treated it as well recognized and settled. To disturb a practice which has existed so long, and is acted on in the Courts of other countries as the settled practice of this country, is a serious matter, and one not lightly to be entertained.

Mr. Dixon cited a redemption decree of the Vice-Chancellor in *Reade* v. *Purcell* (2), dated 29th March, 1882, in which the Vice-Chancellor, in a redemption suit, decreed simple foreclosure on failure to redeem. It is curious that in the Vice-Chancellor's note of the case I find the following minute :—" Ordinary decree for redemption, or, in default, foreclosure and sale." The case seems to have been discussed before him principally on a question of costs. That was a mortgagors' suit for redemption. The decree certainly gave foreclosure in lieu of redemption. But I doubt whether that can be relied upon as throwing doubt on the practice of the Court in mortgagees' suits like the present one; and I may point out that *Loughran* v. *Loughran* (3), from which I have quoted the Vice-Chancellor's remarks, was decided in 1885, three years after the Vice-Chancellor's decree in *Reade* v. *Purcell* (2).

I do not say that I have not jurisdiction to give a simple decree for foreclosure. But, upon a motion for judgment in default of appearance, a well-settled practice is not to be lightly disturbed. The plaintiffs' wish to have the assistance of the Court in obtaining the bonus does not seem to me to afford an adequate ground for the Court to depart from such a well-beaten track.

W. M'G.

(1) 5 Moo. P. C. 393, 426. (2) Notes, vol. xxxiii, p. 28.
(3) 15 L. R. Ir. 71.

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The plaintiffs appealed against so much of the order of the Hon. Mr. Justice Barton as directed a sale of the mortgaged lands, and proceedings incidental to such sale; and applied that in lieu thereof it might be ordered that the defendant should thenceforth stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said lands. A further affidavit was filed for the purposes of the appeal by the receiver over the lands, which alleged that there was no further mortgage affecting the lands (1).

W. M. Jellett, K.C., and *P. C. Gaussen*, for the plaintiffs:—

1. No doubt, the Irish practice has been to decree a sale and not foreclosure; but the power of the Court to decree foreclosure has never been taken away, and is recognized by the Judicature Act (Ireland), 1877, and the Rules of the Supreme Court (Ireland), 1905. By section 36 (5) of the Judicature Act "the redemption or foreclosure of mortgages" is mentioned among the causes or matters assigned to the Chancery Division of the High Court of Justice. Order LV., R. 7, recognizes a mortgagee's right to foreclose. In *Shea* v. *Moore* (2) Porter, M.R., said:—"But, as a question of jurisdiction, there can be no doubt at all that the power to decree a foreclosure simply exists, and always has existed, here." See also judgment of FitzGibbon, L.J., in *Antrim Land, &c., Co.* v. *Stewart* (3). An order in the terms asked for was, in the year 1882, made by Chatterton, V.-C., in *Reade* v. *Purcell* (4).

2. The Court having undoubted jurisdiction to decree foreclosure, we contend that this is a proper case for the exercise of such jurisdiction. No doubt, as stated in Burroughs & Gresson, p. 31, the usual practice may, in ordinary cases, be more conducive to the interest of both the debtor and creditor. But here the defendant has no interest in the lands, and does not appear. The entire purchase-money was advanced by William Robert Bruce, and now the rents do not keep down the interest on the mortgage.

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

(2) [1894] 1 I. R. 163.

(3) [1904] 2 I. R. 357, at p. 369.

(4) Notes, vol. xxxiii, p. 28.

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A sale at twenty-five years' purchase of such rents would not satisfy the plaintiffs' claim; and even if the plaintiffs are given possession, and obtain the bonus on a sale to the tenants, under the Land Acts, the amount of the mortgage debt will not be discharged. There is no second mortgage affecting the lands, so that the Court is not concerned with the interest of puisne mortgagees.

SIR SAMUEL WALKER, C. :—

We do not think that there is any reason for interfering with the order of Barton, J.

It is the right of a mortgagee in ordinary cases, and in this case, to go into possession of the mortgaged property under his deed. The plaintiffs have not done that. They have come to a Court of Equity to realize their charge, and they have come to a Court with a settled practice for centuries of decreeing a sale, and not foreclosure in the sense now asked for.

I do not say that, under special circumstances, and where a special case is made for foreclosure, the Court has not power to grant a decree for foreclosure, and not a sale. No such case has been made here; and I think that, in a case where the defendant has not appeared, and where, being in default, she has naturally trusted that, in the ordinary course of practice adopted by the Court, the property will be sold, and possibly bring more—possibly much more—money than the amount of the mortgage, we should not depart from that ordinary course of practice.

In this case no circumstances of convenience have been shown to lead us to depart from the settled practice, and we do not think that, especially where the defendant has not appeared, we ought to do so.

FITZ GIBBON, L. J. :—

It must be borne in mind that there are two rights of a mortgagee which are capable of being enforced. One is to take the land instead of his debt by going into possession, remaining liable to account in equity if the land is worth more than the mortgage-money; if it is not worth more, the mortgagee keeps it.

Secondly, the mortgagee has the right to turn his security into an effective means of recovering his money, by going to a Court of Equity, and asking the Court to give him whatever remedy it usually gives, and which it is fair to give. In Ireland it has been long considered that the proper remedy is to have the land turned into money. It was considered that an inquiry as to incumbrances was in the interest both of borrower and lender, even where there was only one mortgagee. When there were several, any one of them had equally the right to take some proceeding to recover his money, and then conversion of the land into money was for the convenience of everybody.

We are here asked to omit the judicial step of ascertaining that the land is not worth more than the debt, and to give it over by a foreclosure decree to the mortgagee, in order to enable him to sell it over again to greater advantage. I say nothing as to jurisdiction. There may be many cases where taking the land *in specie* may be a just and proper course; but where only one side is heard, and where the avowed object is ultimately to convert the land into money, I do not think that we ought to depart from the ordinary practice.

HOLMES, L.J., concurred.

Solicitors for the plaintiffs and appellants: *French & French.*

R. ST. J. C.

M. R.
1906.

May 9, 10, 17.

Appeal.
June 22, 25, 29.

LETT *v.* LETT.

Jurisdiction—Action brought by defendant in foreign country—Prior action—Release—Agreement not to sue—Injunction.

The plaintiff, an Irishman by domicil, married the defendant in 1874 at Buenos Ayres. They lived there until 1880, when the defendant left the plaintiff on account of his adultery, and came to live with her mother in London. In 1886 the plaintiff sold the greater portion of his property, which was situated in Argentina, returned to England, and was reconciled to his wife. He took a residence with some land in the county of Wexford, and lived there with his wife until 1888, when he went to Buenos Ayres, realized the rest of his property, and returned to Ireland.

On the 24th September, 1888, the defendant filed a petition against the plaintiff for divorce *a mensa et thoro* in Ireland, and she also filed a petition for alimony *pendente lite*. On the 17th December, 1888, the defendant obtained a decree for divorce. A consent was then signed by plaintiff and defendant, which was made a rule of Court on the 17th December, 1888, and provided that all proceedings in reference to alimony, *pendente lite* or permanent, and all claims for costs, should be settled on the terms that the plaintiff should pay £500 to the defendant, and should execute to her an assignment of his interest in the Wexford property, and that the defendant should execute a deed releasing the plaintiff from all claims present or future by the defendant against him in respect of the relief sought by her in the said cause, or in respect of costs or of alimony, *pendente lite* or permanent. A deed was executed on the 3rd January, 1889, to carry out these terms.

The plaintiff returned to Argentina, where he acquired considerable wealth, and, in 1895, in consequence of a threat by the defendant to institute proceedings to obtain a larger allowance, the plaintiff agreed to give her an annuity of £100 a year, which was paid to her thenceforward. In 1903 the defendant instituted proceedings against the plaintiff in the Argentine Republic, claiming divorce and maintenance. The plaintiff, having come to Ireland in 1906, brought an action against the defendant, who was still residing in Wexford, for an injunction to restrain her from proceeding with the action in the Argentine Court:—

Held (by Sir Samuel Walker, C., and FitzGibbon, L.J.; Holmes, L.J., *dissentiente*), affirming the decision of Sir A. M. Porter, M.R., that an injunction should be granted, as the suit in the Argentine Court was against the terms of the consent of the 17th December, 1888, and the deed of the 3rd January, 1889.

THE plaintiff, Richard Edward Lett, an Irishman by domicil, went to the Argentine Republic in 1866. He opened a school in 1874, and on the 3rd April, 1874, he married the defendant, Charlotte Ella Lett, at the English Church at Buenos Ayres. There was issue of the marriage one child, who died on the 22nd January, 1877. Mrs. Lett came to England after the death of the child for about six months, and then returned to Buenos Ayres. She lived with her husband until 1880, when she left him, owing to his misconduct, and came to live with her mother in London.

The plaintiff commenced farming in the Argentine Republic, and acquired an interest in a ranch at Pique. He sold part of his property in the ranch in 1886 for £10,500, and returned to England. He lived for a short time with the defendant's mother in London. He took a residence, and farm of 50 acres (Irish measure), at Woodville, in the county of Wexford, under lease for one life, subject to a rent of £100. He furnished the house, and the plaintiff and defendant lived there for some time. The acquisition and furnishing of Woodville cost about £1500.

The plaintiff subsequently went to Buenos Ayres and realized the rest of his property there, and in 1888 he returned to Ireland. On the 24th September, 1888, the defendant presented a petition for divorce *a mensa et thoro* from the plaintiff, on the ground of adultery, to the Probate and Matrimonial Division in Ireland. The plaintiff filed his answer on the 27th October, 1888; and on the 14th November, 1888, the defendant filed a petition for alimony *pendente lite*. On the 17th December, 1888, Judge Warren, by his final decree, pronounced in favour of the petitioner and granted her a divorce from her husband. An agreement was then entered into between the plaintiff and defendant to provide for all claims for alimony, and this agreement was embodied in a consent, signed by the plaintiff and defendant, which was made a rule of Court by order dated the 17th December, 1888. It provided that all proceedings in the said cause in reference to alimony, whether *pendente lite* or permanent, claimed by the defendant, and all claims and proceedings by or on her behalf in respect of the costs of the said cause and proceedings for alimony therein, should be settled on the terms that the plaintiff should pay to her the sum of £500, and should execute an assignment to

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the defendant of all his estate and interest in the house and lands of Woodville, in the county of Wexford, together with the household furniture and goods, stock, cattle, and chattels in or about the said house and grounds, and that the said defendant, in consideration thereof, should execute and sign a deed releasing the plaintiff from all claims, present or future, by the defendant, against him, in respect of the relief sought by her in the said cause or the costs thereof incurred by her, whether between party and party, or solicitor and client, or in respect of alimony, whether *pendente lite* or permanent, and in respect of any debts or liabilities incurred, or to be incurred, by the defendant, and indemnifying the plaintiff against the same.

In pursuance of this agreement and consent, an indenture was executed on the 3rd January, 1889, between the plaintiff of the one part and the defendant of the other part, by which, after reciting the proceedings in the divorce cause, the petition for alimony, and the order of the 17th December, 1888, it was witnessed that the defendant released and for ever discharged the plaintiff, his executors, administrators, and assigns, and his estate, "from all claims present and future by her against him in respect of the relief sought by her in the said cause in the High Court of Justice in Ireland or the costs thereof incurred by the said Charlotte Ella Lett, whether as party and party, or as solicitor and client, notwithstanding any order of the said Court made in reference thereto, or in respect of alimony, whether *pendente lite* or permanent, and in respect of any debts or liabilities incurred, or to be incurred, by the said Charlotte Ella Lett, and from all claims whatsoever, present or future, by or on account of the said Charlotte Ella Lett, against the said Richard E. Lett, or his estate or property, real or personal, movable or immovable, now in possession, or hereafter to be acquired by him, and from all rights and interests, claims and demands, which the said Charlotte Ella Lett has or may have in, to, or upon the same or any part thereof."

The said indenture also witnessed that the said Charlotte Ella Lett, for herself, her heirs, executors, and administrators, covenanted with the said Richard E. Lett, his heirs, executors, administrators, and assigns, "that she, the said Charlotte Ella Lett, will

at all times hereafter effectually keep indemnified the said Richard E. Lett, his heirs, executors, administrators, and assigns, and his and their estate and effects, against all acts, proceedings, claims, demands, damages, expenses, and costs whatsoever, in respect of the debts heretofore and hereafter incurred by the said Charlotte Ella Lett, or in respect of the costs of the said cause in the said Division of the said Court, or in respect of any matter or thing hereinafter expressed to be hereby released by the said Charlotte Ella Lett."

On the 3rd January, 1889, the plaintiff executed an assignment to the defendant of the dwelling house and lands of Woodville for the residue unexpired of the lease for which the said lands were held. The defendant went into possession of the said lands and premises, and had since remained in occupation. At the date of the assignment the lands were held under a lease for one life at a rent of £100 a year. The defendant subsequently purchased the said lands under the Land Purchase Act.

Shortly after this settlement had been arrived at, the plaintiff went out to Argentina, where he worked with his brother on a ranch, and after the death of his brother, in 1893, he bought his share in the ranch. The plaintiff acquired considerable wealth.

In 1895 the defendant went out to Buenos Ayres, and threatened to institute proceedings there for the purpose of obtaining a larger allowance from the plaintiff. In consequence of this an agreement was come to, whereby the plaintiff agreed to pay the defendant £100 a year, in addition to the property given to her by the settlement in 1888, and the defendant agreed to forego the legal proceedings. A deed was prepared and signed to carry out this agreement, and a copy of it was produced at the trial by the plaintiff, who stated that the original was filed in the Court at Buenos Ayres with the Judge's decree ratifying it. The defendant had received the annuity of £100 since.

On the 26th of August, 1903, the defendant, Charlotte Ella Lett, instituted proceedings in the Court of the Argentine Republic against the plaintiff, Richard Edward Lett, and presented a petition to the Judge of first instance in civil matters for divorce and division of property and alimony against the plaintiff, Richard

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Edward Lett, claiming that an embargo should be placed upon all the plaintiff's property in the Argentine Republic, and that a sum of 2,000 dollars should be paid monthly for the maintenance and law expenses of the defendant, and that a sum of money should be paid by the plaintiff to meet the necessities of the defendant. These proceedings were grounded upon alleged adultery of the plaintiff with the same person as was mentioned in the petition in the proceedings for divorce *a mensa et thoro*, upon which the final decree was pronounced by the Divorce Court in Ireland on the 17th December, 1888; but—as the plaintiff alleged—no mention was made by the said Charlotte E. Lett in the Argentine petition of the decree or proceedings in Ireland.

Richard E. Lett, having returned to Ireland in 1906, brought an action against Charlotte E. Lett, in which he asked (1) for a declaration that the final decree of the Probate and Matrimonial Division of the High Court of Justice in Ireland, pronounced on the 17th December, 1888, was a definite and binding sentence of divorce *a mensa et thoro* between the plaintiff and defendant. He also prayed (2) for an injunction to restrain her from instituting or continuing proceedings for divorce or separation of goods, or for alimony, in the Court of the Argentine Republic or elsewhere against the plaintiff.

The defendant by her defence pleaded that, on the construction of the agreement and indenture dated the 3rd January, 1889, the defendant did not release any claims which she might have against property of the plaintiff situate in the Argentine Republic, and that the said consent and release were confined merely to the relief sought for in the Divorce Court proceedings, including a right of the defendant to such alimony as would be awarded to her by the Divorce Court in Ireland, and in no way affected any claim which the defendant might have against the property of the plaintiff under the law of the Argentine Republic.

The defendant further pleaded that it was not the intention of the plaintiff and defendant at the time the agreement and indenture of the 3rd January, 1889, were signed, that these documents should release the claims which the defendant might have against the plaintiff's property in the Argentine Republic, and that if these documents were capable of such a construction,

it was a mistake, and the defendant counter-claimed that the agreement and indenture of the 3rd January, 1889, should be rectified by inserting a clause therein expressing that the said indenture was without prejudice to any claim which the defendant might have against the plaintiff under the laws of the Argentine Republic.

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No evidence was given at the trial by an expert of the law of Argentina; but the plaintiff was cross-examined on the subject, and he stated that by Argentine law all the property that was gained during the marriage, except legacies and inheritances, belongs to both, and the partnership is called "*Sociedad Conjugale*," of which the husband is the administrator and managing partner. That partnership remains till it is dissolved by death, or by a Court of competent jurisdiction; it would be dissolved by a decree for divorce.

Ronan, K.C., *Samuels, K.C.*, and *Hanna*, for the plaintiff.

Matheson, K.C., and *James O'Connor*, for the defendant.

THE MASTER OF THE ROLLS:—

May 17.

The statement of claim, which I do not intend to read *in extenso*, alleges in its first line and afterwards that the plaintiff was domiciled in Ireland, and was married to Charlotte Ella Lett, otherwise Geoghegan, on the 3rd April, 1874, at the Anglican Church, Buenos Ayres, in the Argentine Republic. Thus it is conclusively admitted, not being denied, that the plaintiff was and is domiciled in Ireland. If this is so, it follows, as a necessary consequence, that defendant also was and is domiciled in Ireland, for, according to our law, the domicil of the wife is that of her husband.

After living some time in Buenos Ayres, there arose unpleasantness between them; later on, in April, 1880, the defendant returned to this country.

On returning to Ireland, Mrs. Lett presented a petition in the Matrimonial Division of the High Court in this country, on the ground of the present plaintiff's adultery, the basis of which, so far as jurisdiction to entertain the suit was concerned, was the admitted fact that the domicil of both parties was Irish, and

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on her petition a decree of divorce *a mensa et thoro* was pronounced by Judge Warren on 17th December, 1888, which was the only divorce then, and is now the only divorce, known in the Irish Courts. There is no power here to pronounce a divorce *a vinculo matrimonii*.

The plaintiff during all this time was not a person of very large resources. He had been a schoolmaster in Buenos Ayres, and was then a man of limited means.

After the decree for divorce an agreement was entered into between the parties, who were then at arms' length and perfectly competent to contract with each other, by which it was arranged that they were to live apart, and that he was to pay his wife £500, and to convey to her the lands of Woodville, Co. Wexford, in lieu of and in full discharge of all her claims, present or future, upon him as his wife, and both of them signed this agreement and the conveyance of Woodville on the 3rd January, 1889. He then went back to Buenos Ayres and went into the business of ranching, and she lived at Woodville, in this country. She, however, after a time, finding that he was then in a better pecuniary position, became dissatisfied with the amount of the provision made for her, and presented a petition to the Courts of Buenos Ayres in May, 1895, in which she claimed to participate in his goods under the laws of the Argentine Republic. The suit was compromised by an agreement which might have been made here, and was certainly capable of being taken cognizance of in our Courts; and by that agreement Mr. Lett undertook to pay her £100 per annum extra, which was to be in full of all claims. The making of that agreement is not disputed. It was argued for the defendant that the plaintiff's entering into any such transaction was an acknowledgment by him that she had a legal claim under the law of the Argentine Republic. It was suggested, though not proved in any way, that under the law in that State, as between a husband and wife on their marriage, a partnership is set up at once between them on equal terms as to and including everything which either party should gain or receive otherwise than by legacy or descent during the coverture; and that consequently the partnership gave the present defendant a right to make the present claim, because it was said that Mr. Lett's means have largely increased in the meantime.

The latter proposition is not in dispute. There is no doubt he is now a man in comparatively affluent circumstances, arising out of the development of property which he had bought for a mere trifle, but which turned out to be very valuable, and from his having become otherwise entitled to valuable property. In the year 1903 the defendant instituted a third suit (still pending) in the Argentine Republic, claiming a partnership, in which suit a very important question would, so far as I know, probably be the question of domicil. On the facts before me, I must take it as conclusively established for the purposes of this suit that the domicil was that of the United Kingdom, or rather of Ireland. The reason is that the proceedings before a most learned, capable, and cautious Judge would have been *coram non judice* if the domicil was not Irish at the time of the decree of 1888. Secondly, that decree was pronounced on the application of the lady herself, the jurisdiction depending on the domicil of the parties being Irish. Again, in this case now before me, the very first averment, as I pointed out after the names in the statement of claim, is that the plaintiff was domiciled in Ireland; and that is repeated in another paragraph, and is not denied or questioned; and I may add that, on the facts as they are in proof, there does not appear to me to be a scintilla of evidence that Mr. Lett ever lost his domicil of origin, which was clearly Irish. It is not impossible that a man may actually have two domicils, one according to the law of one country, and another according to the law of another country. I do not know how that may be; but so far as the decree of the Probate and Matrimonial Division and anything done in that matter, it is absolutely concluded that the domicil of both parties was Irish throughout. The suit in Argentina is in the nature of an action claiming a partnership on the basis of the domicil being Argentine, and the present action is presented in a double aspect.

There are two distinct and separate claims. The statement of claim asks:—(1) For a declaration that the decree of the Probate and Matrimonial Division of the 17th December, 1888, was valid and binding; (2) (paragraph 4) "An injunction to restrain the defendant from instituting or continuing any proceedings in the Courts of the Argentine Republic, or elsewhere, against the plaintiff or his property, for the purpose of claiming

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alimony or separation of goods, or any payment from the plaintiff, or out of his property, for her support, maintenance, debts, or otherwise."

It will be seen that these two claims are separate matters. The first is to have a declaration that the decree of Judge Warren was right; and, secondly, I am asked for an injunction to restrain proceedings founded on what has taken place between the parties in no way dependent on the question of divorce proceedings in this country.

I must consider these separately.

The first question arises as to the declaration which I am asked to give in regard to the decree of 1888. Being called upon to consider that decree, it follows that if I can do so I have power to reverse or modify it. But the law recognises only one way of annulling a decree, *i.e.*, by appeal; and the time for that appeal, for which I cannot see the slightest shadow of reason or ground, is long since gone. If it were not, I am not sitting here as a Judge of the Court of Appeal. Now let us see the consequence if this Court were to take upon itself to declare valid a decree of, say, the King's Bench Division. The King's Bench Division then would have exactly the same power to declare invalid the preceding decree of this Court. This is a *reductio ad absurdum.* A decree of a competent Court in this country is final and binding, save in a case of fraud, until annulled by a Superior Court. The plaintiff's contention amounts to this, that one of our Courts should declare that a solemn, regular, and formal decree of another Court of co-ordinate jurisdiction, or rather of another branch of the same Court having full jurisdiction, is a binding decree. If I did so, my decision could add nothing to the undoubted and unquestioned validity of the judgment of the Probate and Matrimonial Division—a judgment which, as it is unassailable upon any ground whatever, needs no aid, and can gain no reinforcement, from anything that I might officiously and therefore extra-judicially declare. Such a declaration has never been asked for in the history of the law, so far as I am aware, or, at any rate, such a case has never been reported, and I am now asked to make a precedent by saying that the decree of the Matrimonial Division concerning a matter over which it has full jurisdiction, was valid

and binding. In the absence of fraud, every decree is binding till reversed on appeal in the regular way, and within the prescribed time. And as to fraud, the defendant, Mrs. Lett, herself asked the aid of the Court, and obtained the decree which she desired! How then could she allege that it was obtained by her through fraud? What would be the consequence of entertaining an application of this sort? If there is power to affirm the decree of 1888, it must be because I have some jurisdiction. There is no doubt that in some cases, as in the *Manar Case* (1), a question as to our law has been explained and stated in reference to proceedings in a foreign Court. In that case Bucknill, J., referred to the fact that it was not the practice in the French Courts to examine English experts in a matter of French law. Accordingly, he avowedly went out of his way to state what the English law was, acting no doubt from regard to the comity of Courts in assisting each other to arrive at a correct decision on a foreign question. Whether that was a prudent course or not, I express no opinion. I assume that it was, and was done as a matter of judicial comity. But the learned Judge never went out of his way to say that a decree of the Probate, Chancery, or Admiralty Court was a valid or binding decree. It was not a question of a decree at all, but merely a statement of what the law upon a particular point was in England, so that the French tribunal might have the benefit of his opinion and enunciation in lieu of other proof. The case is in no way analogous. I fail to find any ground either on principle or authority on which I can give any such declaration as I am asked for. Not that I have the very slightest doubt as to the perfect validity of the decree of 1888, because the decree of the Probate and Matrimonial Division speaks for itself, and binds everyone. It cannot be impeached, and cannot be fortified by anything I can do sitting here. It is conclusive as to domicil and as to every other matter necessarily involved in it. If a foreign tribunal were disposed to ignore it, any declaration I might make would be with far greater reason subject to the same treatment. It would be dangerous to introduce any such new practice. I, therefore, hold that the plaintiff fails on that part of the case.

(1) 89 L. T. (N. S.) 26.

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The other question is of a different character, and stands on a different footing, and that is the one which asks for an injunction to restrain defendant from making a claim for alimony, separation of goods, or other relief, in consequence, not of the decree, but of what took place after the decree, the assignment of Woodville, and the agreement to pay this annuity for £100, with an express release of other claims by Mrs. Lett.

Was there such a contract? That cannot be disputed. There is no averment that it was voidable or void. It is not alleged that it was procured by fraud or undue influence. It has been acted on for seventeen years. The lady has been in possession of Woodville for seventeen years. She has had her £100 a year since the plaintiff agreed to give it to her. That payment of £100 a year was, as I have said, relied on as being a confession by the plaintiff that he had no case to resist the order that was being sought for in the proceedings abroad. He was cross-examined about this, and his explanation was that "the law in Argentina was a very costly luxury," and not unattended with some of those delays from which (it is said) even our Courts are not free, though the present case is at least not an illustration of that. He says the former case, which was compromised, was compromised because he believed it would have cost him much more time and trouble than would be equivalent to £100 a year. There can be no doubt that both agreement and assignment were regular, valid, and binding agreements between the parties, the lady being, for all purposes, in the position of a *feme sole*, acted upon since 1889, and all the benefit enjoyed by her. Under these circumstances is it equitable that she should bring a suit for the purpose of establishing claims utterly inconsistent with the contract to which she had so conclusively bound herself?

In cases before the Judicature Act it was not an infrequent course for the Court of Chancery to give injunctions to restrain persons from asserting legal rights against equity, in foreign Courts as well as our own, and many cases are referred to on the subject. Since the Judicature Act, no such case can arise in reference to our Courts, because, so far as Ireland is concerned, the Judicature Act expressly prevents its being done, and because what was a ground of injunction before the Act is now a ground of defence, and can

be relied on in any other legal way in the Court in which the case arises.

The old and established jurisdiction of this country in reference to cases in foreign tribunals was founded not on any arrogant assumption of powers in our Courts over foreign tribunals, but upon an undoubted control over the subjects of the realm, as a personal right to restrain them from committing injustice by prosecuting inequitable claims in respect of property, wherever asserted.

The rule is clear on the authority of the House of Lords in *The Carron Iron Co.* v. *Maclaren* (1), and other absolutely unquestioned decisions to the same effect. Mr. Kerr, in his book on Injunctions, says, p. 577 :—"The High Court of Justice has clear and undoubted jurisdiction on a proper case being made out to restrain persons within its jurisdiction from prosecuting suits in the Courts of foreign countries. In the exercise of this jurisdiction the Court does not proceed upon any claim of right to interfere with or control the course of proceedings in the tribunals of a foreign country, or to prevent them from adjudicating on the rights of parties when drawn in controversy, and duly presented for their determination. The jurisdiction is founded on the clear authority vested in Courts of Equity over persons within the limits of their jurisdiction, and amenable to process to restrain them from doing acts which work wrong and injury to others, and are therefore contrary to equity and good conscience. As the order of the Court in such cases is pointed solely at the individual, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party to whom it is addressed is prosecuting his action in the Courts of a foreign country. If the circumstances of the case are such as would have made it the duty of the Court of Chancery under the former procedure to restrain a party from instituting or carrying on proceedings in a Court here, they will warrant the High Court of Justice in restraining proceedings in a foreign country."

There is thus no doubt as to the jurisdiction. Is this, then, a case in which to exercise it? There can be no doubt that it is

(1) 5 H. L. Cas. 416.

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utterly inequitable that the lady who was a party to these agreements should, as an individual, seek to throw them aside and proceed to assert rights absolutely contrary to them. There can be no doubt that the jurisdiction exists, and that this is pre-eminently a proper case for the exercise of that jurisdiction.

No case of delay is pleaded or relied upon, and I do not think, having regard to the circumstances of the case, and the fact that the lady has already succeeded in having an embargo in the nature of an injunction placed upon the whole of the property of her husband in Argentina, that it is too late for this Court to do that which is not only within its power, but is its bounden duty to do. Therefore, there will be an injunction as demanded in the 4th paragraph of the statement of claim. Whether the injunction will be a valuable help to the plaintiff or not it is not for me to say. What our law can do in the matter, he is entitled to require. The decree of the Court will therefore be—"That the defendant be and she is hereby restrained from instituting or continuing any proceedings in the Courts of the Argentine Republic, or elsewhere out of the jurisdiction, against the plaintiff or his property for the purpose of claiming alimony or separation of goods, or any payments from the plaintiff or out of his property for her support, maintenance, debts, or otherwise."

R. W. L.

Appeal. 1906. June 22, 25, 29.

The defendant appealed (1).

Matheson, K.C., and *James O'Connor*, for the appellant:—

The decision of the Master of the Rolls was based on the deed of 3rd January, 1889, and the question is—Does that deed, on its true construction, support the decree? We submit that the deed did not take away Mrs. Lett's rights under the Argentine law in the conjugal partnership. By that law the wife acquires an interest in all the property of the husband, which he may acquire during

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

the "Sociedad conjugale," and that right of the wife was not mentioned or referred to in the deed of 3rd January, 1889. The recitals in that deed would not support such a construction. The words in the covenant do not relate to property acquired abroad. A proceeding before a foreign tribunal will not be restrained, where it is the only Court where the petitioner can get relief: *Hyman* v. *Helm* (1); *Re Maudsley, Sons, & Field* (2). Alimony cannot be released: *Watkins* v. *Watkins* (3). If on the balance of convenience the proceedings should be allowed to take their course, the Court will allow them to continue. The suit has been going on for over two years in a foreign country, the applicant has pleaded in the suit, and has further taken several steps in that suit, and the Court ought not to stop it.

Ronan, K.C., Samuels, K.C., and *Hanna*, for the plaintiff:—

The Divorce Court will not order an increase of alimony where the husband has become wealthy since the separation deed: *Gandy* v. *Gandy* (4). The wife can release alimony, or she can take a bulk sum in lieu of an annual payment. An injunction will be granted to stay a suit in another country brought for the same purpose as a suit already decided at home: *Armstrong* v. *Armstrong* (5); *Booth* v. *Leycester* (6). If the circumstances of a case are such as would make it the duty of one Court in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court: *Carron Iron Co.* v. *Maclaren* (7). It would be against equity to allow the present action to proceed, because, by the deed of the 3rd January, 1889, the wife released all claims she had, or might have, in the property of her husband, present or future, and covenanted not to make any claim on it.

(1) 24 Ch. D. 531.
(2) [1900] 1 Ch. 602.
(3) [1896] P. D. 222.
(4) 7 P. D. 168.
(5) [1892] P. D. 98.
(6) 3 M. & C. 459.
(7) 5 H. L. Cas. 416.

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June 29.

SIR SAMUEL WALKER, C. :—

In this case the Master of the Rolls has granted an injunction restraining the defendant, who is the wife of the plaintiff, from instituting or continuing any proceedings in the Court of the Argentine Republic, or elsewhere, against the plaintiff, or his property, for the purposes of claiming alimony, or separation of goods, or any payment, from the plaintiff, or out of his property, for her support, maintenance, debts, or otherwise.

The plaintiff and defendant were married on the 3rd April, 1874, in the Anglican Church, Buenos Ayres, in the Argentine Republic. The plaintiff had an Irish domicil. They lived at Buenos Ayres for some time, and the plaintiff had a school there. He appears to have formed an adulterous intercourse with a woman in his service, and in 1888 they were both in Ireland. He had become the owner of a farm and residence called Woodville, in Wexford. The adultery naturally led to unpleasantness, and on the 22nd September, 1888, the defendant presented a petition in the Irish Court for divorce *a mensa et thoro* on account of his adultery, which he answered. The Irish domicil of each was admitted in that suit, and a decree was pronounced in it by Judge Warren on the 17th December, 1888. In such a suit alimony *pendente lite*, and permanent alimony, subsequent to the decree are, of course, obtainable, and the obtaining of them was part of the object of that suit.

According to the Argentine law a woman becomes entitled to certain rights in her husband's property in the nature of a partnership, and it appears that all property acquired by them during the marriage belongs to both—everything except legacies or inheritances. The partnership is called "Sociedad conjugale." This is the statement given by the plaintiff, and is the only evidence given here of Argentine law. The husband is the administrator of it, and managing partner, and that partnership remains until it is dissolved by the decree of a competent Court on divorce, or by death; and on a divorce the wife can claim a separation of goods.

There was a petition for alimony *pendente lite*, in which the defendant set forth, according to her estimate, all the property to which her husband was entitled, both in Ireland and the Argentine Republic, and she included Woodville, and an estate or cattle-run

in the Argentine Republic, and other property. The husband filed his answer on the 22nd November, 1888, in which he dealt with the various items in the petition; and as regards the Argentine property, alleged it had been realized, and that all from this source was represented by a sum of £2000 in cash. No alimony was in fact awarded. The suit came on for hearing; the adultery was admitted, and a decree was made for divorce on the 17th December, 1888, and on the same day a consent was entered into and made a rule of Court to settle the suit, and all relief under it, and all claims for alimony, whether *pendente lite* or permanent.

This consent provided that the plaintiff should pay her a sum of £480 net, and should also pay her solicitor's costs, and execute a deed assigning to her the premises of Woodville, and furniture and chattels therein, and that she should execute a deed releasing him from all claims in respect of relief in the suit and costs, and alimony, *pendente lite* and permanent, and all debts to be incurred by her, and all claims whatsoever, by or on account of the said Charlotte Lett, and indemnifying the said Richard Lett against the same. Two deeds were accordingly executed, each bearing date the 3rd January, 1889, by one of which he assigned to her the premises of Woodville, and the furniture and chattels therein. The lands have since had a judicial rent fixed in respect of them, and it appears to be a valuable interest, and the moneys stipulated for were paid; and, by the other deed of the same date, she released the plaintiff from all claims for alimony, *pendente lite* and permanent, in the terms of the consent, "and from all claims whatsoever by or on account of the said Charlotte Lett against the said Richard Lett, or his estate or property, real or personal, movable or immovable, now in possession, or hereafter to be acquired by him, and from all rights and interests, claims, and demands which the said Charlotte Lett has, or may have, in, to, or upon the same, or any part thereof."

Such were the contracts contained in the consent and deeds. Was she competent to enter into them? I consider it to be settled law that a married woman suing her husband in the Matrimonial Court is at arm's length: and, in the absence of fraud, free to enter into a contract with him for the settlement of the litigation.

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Besant v. *Wood* (1) is one of many cases establishing this. The compromise of litigation would itself furnish an ample consideration; but she also obtained the assignment of Woodville and furniture, of which she went into possession.

Next, what is the construction of the contract? Was she left free to assert a claim in the Argentine Republic against the property he might acquire there, seeking a division of property under the Argentine law? This is a question of construction, for I do not think it is open to serious argument that she could not bind herself not to enforce a claim in any Court—domestic or foreign—or a claim of any nature, whether under Argentine law or English law, against his property, whether it be in the nature of alimony, or of any other kind: and the claim for division of property is of the character of alimony, which she had specifically contracted not to claim. In 1895 she went over to Buenos Ayres, and preferred a claim on account of her poverty, by reason of which he agreed by deed to give her an allowance of £100 per annum in addition to what she got under the deed of 1889. As this deed of 1895 is not relied on in the pleadings, or at the bar, I do not rest anything upon it.

Well, in 1903, she commenced proceedings in the Argentine Court, in which she claimed a divorce (though it had been already granted), and it is stated the divorce in that republic can only have the same efficacy as a divorce in Ireland, and as consequential to this divorce she claimed a separation of goods—in other words, claimed to be maintained out of the property he had acquired in the Republic, subsequent to the divorce and deeds in Ireland. He has defended that suit, and relies upon the contracts and transactions and deeds of 1889 as a defence, and also on the deed of 1895; and these proceedings are still pending, and the Argentine Court is, I assume, competent to pronounce on them.

It is not disputed that in the interval since the Irish proceedings he had acquired very considerable property, and was comparatively a wealthy man, and, therefore, she was interested in trying to get out of her contract of 1889, and get further maintenance; but whether she can do so or not depends, I think,

(1) 12 Ch. D. 605.

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on the contract she made. It is not suggested that it was obtained by, or can be avoided for, fraud, and the suggestion in the defence that it could be reformed was not argued.

Does it make any difference that the proceeding sought to be restrained is a proceeding in a foreign Court? I think not, because the equity against her is founded not upon the tribunal to which she has resorted, but upon the personal contract binding her conscience. The jurisdiction asserted is not against the foreign tribunal, but against the person within the jurisdiction, who has made a contract not to resort to proceedings; and whether such proceedings are in a foreign Court or not, is immaterial for the purposes of the equity on which the jurisdiction rests—an equity *in personam.*

The rule is clearly laid down in *The Carron Iron Co. Case* (1), and numerous other cases. I was for a time inclined to think that ascertainment of the Argentine law as to this division of property, and its limitations, and the circumstances under which it would arise, was material to the relief, and should be before the Court before we interfered; but, on further consideration, I do not think this is so. It is a claim against the husband's property covered by her contract; and if that be so, she is bound not to put it forward in any Court—just as she would be restrained according to the decision in *Gandy* v. *Gandy* (2) from prosecuting a claim for further alimony in the Irish Court. The plaintiff has, no doubt, allowed three years to go by before instituting this suit on the 3rd March, 1906. He never could get an interlocutory injunction; but if he has the right under the covenant, the delay does not deprive him of the only remedy he has for its assertion.

I am of opinion that the decision of the Master of the Rolls should be affirmed, and the appeal dismissed; but having regard to the delay which has taken place, and the time he allowed the Argentine proceedings to continue before he resorted to his rights under the contract of 1889, and also to the relations between the parties, I think there should be no costs awarded against the defendant in the Court below or here.

(1) 5 H. L. Cas. 416. (2) 7 P. D. 168.

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FITZGIBBON, L.J. :—

It appears to me that the rights of the parties in this case can be best determined by considering two questions.

(1) What were the rights, if any, which the plaintiff had in the way of restraining proceedings against his person or property by his wife, on the completion of the arrangement which was carried out by the two deeds of January 3, 1889, on which the action is based ?

(2) If the plaintiff could have restrained the action, which his wife commenced against him in the Argentine Republic on August 26, 1903, has anything happened since to justify the Court, in its judicial discretion, in now refusing to give him relief ?

I think it clear that the answer to the first question can in no way depend upon any question of foreign law. The law of the Argentine Republic may regulate the rights of the parties with respect to property there ; but it cannot possibly affect the jurisdiction or duty of the Irish Courts, as to the enforcement of a contract made in this country when both parties were domiciled here, and which contract arose out of proceedings in the Irish Matrimonial Court, to whose jurisdiction both of them had submitted.

It seems equally clear that no conflict of laws, or question of the comity of Courts, can arise with respect to an Argentine tribunal, which would not have arisen with respect to an English or Scotch Court, or between Irish Courts of law and equity, while those departments of our judicature were assigned to different tribunals.

The transactions of 1888-9 comprise two stages—one judicial, and the other contractual ; they began with an action by the wife against the husband for divorce *a mensa et thoro* and for judicial separation, based on the husband's misconduct, and enabling her to obtain, by prosecuting her suit, an enforceable provision by way of alimony—first *pendente lite*, and afterwards permanent—to be measured in just proportion to her husband's means.

The judicial proceedings in the main suit had gone to petition, answer, and decree for separation, and an interlocutory proceeding for alimony had gone to petition and answer, when the litigation was settled upon the terms that the separation decree should stand, and that the provision for the wife should be determined by contract, and should be carried out by the execution of

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mutual deeds of conveyance and release, on terms judicially sanctioned. The ruling instrument is the consent, which was made a rule of Court on December 17, 1888.

I am satisfied that the subsequent deed of release of January 3, 1889, must be construed by reference to this consent, and I assume that the deed cannot, by general words, deprive the wife in equity of any property or right which she had not by the consent agreed to surrender. But I can find no real difference between the terms of the two documents, and the wife's counterclaim that the deed should be reformed if it releases her husband's property in Argentina, would, in my opinion, be maintainable if the deed, as distinguished from the consent, had released that property. But, on the other hand, if she bound herself by the consent to surrender any claim she had to that property, the deed must have the effect of binding her not to claim it, either here or in Argentina.

I, therefore, consider the question upon the nature and terms of the consent itself. It provided for the settlement of all proceedings in the cause in reference to alimony, whether *pendente lite* or permanent, and of all claims and proceedings in respect of the costs of the cause and proceedings for alimony therein. If the cause had not been settled, an order for permanent alimony was the proceeding by which the wife from time to time could enforce a provision during her life proportionate to his means here or elsewhere, and either party would have had the right, from time to time, to vary the amount of that provision, if his means had increased or diminished. The provision would also have been inalienable by her.

The interlocutory petition and answer show that his property in Argentina, at that date, was the subject of discussion; she alleging that it was very large, and he, on the contrary, alleging that he had converted the whole of it into money, had left Argentina, had invested the larger part of the proceeds of his property there in buying and stocking a house and farm in Ireland, intended as a home and means of subsistence for himself and his wife, which intention was frustrated by the "unhappy differences" which arose between them, and culminated in the suit and in their separation.

He alleged that his only remaining property was the balance

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of the proceeds of the Argentine property over and above what he had spent in costs of travelling and litigation, and in the purchase of the Irish property, which balance he alleged to amount to only about £1,000. If the suit had not been settled, alimony would have been the judicial form in which the wife's claim for subsistence must have been satisfied so long as she lived, and it is utterly inconsistent with the terms of the deeds, and with the proceedings which led up to the settlement, to suggest that the Argentine property, whatever it was, was not taken into consideration, as being the husband's.

The substance of the consent was that he should pay her £500, and assign to her all his property in Ireland, house, land, furniture, stock, and chattels; and that she, in consideration of that provision, should release him from all claims, present or future, in respect of the relief sought by her in the suit, or in respect of alimony, whether *pendente lite*, or permanent, and in respect of her debts, present or future, and of all claims whatever on her account, and should indemnify him against the same.

I can give this arrangement no less effect than that of a final determination by and between a husband and wife, when at arm's length, contracting with each other as distinct parties each *sui juris*, that for better or worse, for richer or poorer, he should give and she should take the consideration fixed by agreement, in lieu and satisfaction of all claims which, then or at any future time, she could otherwise have made as his wife against him or his property, wherever situate, during their joint lives.

If there were no other answer to the wife's demand of liberty to prosecute her pending suit in Argentina, it would seem to me to be enough to say that equity can not permit her to do so, so long as she retains and enjoys the agreed consideration for the contract not to sue which the deed of 1889 imports—except upon the terms of accounting, against her present claim, for what she has received, and is receiving, under the contract which she now seeks to "reprobate." An injunction which can be enforced if necessary, by sequestration of the Irish property is the appropriate —if not the only—remedy for such a breach of contract, and it is not argument, but caricature, to describe this suit as one "brought by the plaintiff to put his wife into gaol."

The arrangement of 1888–9 necessarily imported on each side that no subsequent change in their circumstances could alter the rights of the parties: neither could the husband, if he became poorer, get back any of the property he gave; nor could the wife, if he became richer, make any demand for further provision for her maintenance.

I do not understand the possibility of contending that the judicial provision for a separated wife in the form of alimony is not to be measured in proportion to the husband's means *wherever situated*, and in the particular case it is proved that the amount of the Argentine property was actually in controversy when the contractual substitute for permanent alimony was accepted; and this controversy was one of the claims which was settled for the consideration fixed by the deeds.

Gandy v. *Gandy* (1) is an authority of the Court of Appeal that a separated wife, by covenanting not to take proceedings against her husband, on his covenanting to allow her a sum fixed by a separation deed, for the maintenance of herself and her children, even in the case of his subsequent misconduct, and of his becoming subsequently wealthy, debars the Court from giving her any increased provision by way of alimony, because she is bound by deed to accept the sum fixed by the contract in satisfaction of all her claims for support.

It can make no distinction in law between that case and this, that the deed there preceded the suit, for here the final settlement of the suit itself was part of the consideration for the fixed provision which was made and accepted.

The validity and binding effect of separation deeds have varied under our law, but it was never contended that their operation *in personam* was in any way affected by the situation of property, or governed by any other law than the *lex loci contractûs*.

Lord Justice Fry says (2):—

> "A contract made abroad may be enforced against a defendant within the jurisdiction of this country, and, as the remedies for breach of a contract are clearly governed by the *lex fori*, it follows that it is no

(1) 7 P. D. 168. (2) Sp. Perf. (4th ed.), p. 52, sects. 126, 127.

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objection to the specific performance in England of a foreign contract that the foreign law might have given no such remedy.

"This jurisdiction extends to cases of contracts relative to real or immovable property where the defendant is within the jurisdiction of the Court. The maxim is *Æquitas agit in personam*, and any operation of the judgment on the immovable estate abroad is not direct but indirect, and only through the medium of the person affected by the judgment."

He notices a case, *Hart* v. *Herwig* (1), in which the Court of Chancery granted relief with a view to specific performance against a defendant not within the jurisdiction, and he says "the decision is remarkable, but it has the authority of three unanimous judges."

These statements of the law follow the statement that—

"Although the Court has no jurisdiction in matrimonial causes, yet, where there has been a contract or covenant, it may interfere to enforce the execution of a proper separation deed, or to restrain the breach of a covenant contained in it."

The personal covenant of a separated wife not to molest or sue a husband is, from its very nature, an obligation for the breach of which there is no practical remedy except a decree, in the nature of specific performance, for an injunction to restrain a suit threatened or commenced; therefore, if the covenant is lawful and proper, the decree for specific performance by injunction, being the only remedy, is *ex debito justitiæ* and not discretionary.

If a suit was not maintainable, it could be defeated on the merits; it is only where there *is* a legal claim, that the interference of a Court of Equity becomes necessary; therefore, proof that the suit which it is sought to restrain will, if it proceeds, result in the establishment of a claim against the defendant therein, only shows the necessity for the suit *in personam*, by which its prosecution is to be restrained.

That the situation of the Court in which the suit is instituted, and the extent of its jurisdiction, are immaterial to the question whether the suit is to be restrained or not, is plain on principle. A striking instance is to be found in *Booth* v. *Leycester* (2) where Lord Cottenham restrained the prosecution of a suit in Ireland

(1) L. R. 8 Ch. 860. (2) 3 M. & C. 459.

to recover annuities which had already been the subject of a suit in England, notwithstanding that the Irish suit had been prosecuted for a considerable time.

In his judgment he says:—

> "This Court will not permit him to retain, for the purpose of suing elsewhere, securities upon which, according to the judgment of the Court, nothing remains due." "Whether he would or would not have got more if he had at first proceeded in Ireland is immaterial."

This principle must apply to a case where the person suing abroad is here in conscience bound not to sue.

The Carron Case (1) lays down the principle in even more general terms—

> "If the circumstances are such as would make it the duty of one Court in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court.
>
> "Where there is a plain equity in favour of an injunction, and those who seek it are in this country, the Court will grant it, and restrain the proceedings in the Courts of a foreign country."

For these reasons, and on the facts of this case, including the construction and effect of the release, I have no doubt that the Master of the Rolls was right in holding that the injuction against the Argentine proceeding should go, provided this suit had been brought with sufficient promptitude.

It is a further important circumstance in favour of the plaintiff that, by the second deed of January 3rd, 1889, he completed the consideration for the release by absolutely assigning to his wife the house and land, and paid her the money, and gave her the chattels, which she agreed to accept as the consideration for her covenant not to molest or sue him either personally or in respect of his property. The Irish property assigned to her was valuable, and it has increased in value since she got it, through a purchase under the Land Acts. It comprised what had been intended as the home and means of subsistence of both husband and wife, if they had not separated; and there is nothing to suggest that, as matters

(1) 5 H. L. Cas. 416.

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stood in 1889, it was not a reasonable provision for the wife alone. Therefore, after-acquired property of the husband, and nothing else, is now at stake.

The transaction of 1895 is not put in issue, and the deed of that year, though proved by the exemplification of it from the Argentine Registry, is not relied upon in pleading, and, therefore, cannot be made a ground of relief. But it is evidence, by way of admission, of the validity of the release of 1889, and it may also be referred to upon the second question—namely, whether anything has occurred since 1889 which could justify the Court, in the exercise of its discretion, in refusing relief now. We have the defendant's own representation of that transaction in the recitals contained in the "protocol" filed in the Argentine Court. Neither in the deed itself, nor in the protocol, is it suggested that the additional provision of £100 a year, which the husband then covenanted to give her, out of his increased means, was given otherwise than as a voluntary act of bounty. She set out and confirmed the release of 1889, and she described the occasion of the additional grant of £100 a year as being "her having arrived at a state of poverty, and solicited from him some means with which to meet her requirements," and she stated that, "having with that object come to Buenos Ayres, she and her husband had entered into the private arrangement" expressed in the deed, for which they both solicited, and obtained, the approbation of the Argentine Court in the form of "protocolization" of the instrument, which appears to be an Argentine form of registration.

No injunction is sought, nor do I think could it have been given, upon the present proofs, against any proceeding on that instrument. It is not now before us in any way except as evidence of ratification of the release of 1889, which is the only foundation of this suit. The husband alleges that he regularly paid the money up to the time when she sued him in 1903, and even afterwards, and he admits his liability to pay it still, subject only to her abiding by her contract not to sue for more. If he had failed to do so, and she had sued him in Argentina *upon that deed*, such a suit could not be restrained under the release of seven years before.

The only remaining suggested ground of defence is that the plaintiff has pleaded in the Argentine suit, and has allowed it to proceed for three years. He could not help pleading, and he was free to defend himself. If the bringing of the suit was a breach of the contract of 1889, allowing it to go on could not disentitle him to stop it at any stage, unless his doing so amounted to laches or acquiescence, or changed the wife's position for the worse. He has proved that he was in Argentina when the suit began; that an embargo was put upon his property there, and that he could not conveniently come to this country for relief until the tedious and expensive proceedings had reached their present stage. It seems to me to be only an aggravation of the injury inflicted upon him by the breach of the contract not to molest or sue him, that he was not able to have recourse to this Court until the oppressiveness of the Argentine litigation had become intolerable.

I, therefore, concur in all respects with the judgment of the Master of the Rolls, and hold that this appeal ought to be dismissed. But, having regard to the delay, and to the relations of the parties, and to all the circumstances, including the fact that the husband's misconduct began the trouble, I think it just that he should bear all his own costs, including the costs of the appeal.

HOLMES, L.J.:—

The plaintiff and defendant, both British by birth, were married in 1874 in Buenos Ayres, where the plaintiff had been residing for some years. They lived there together, except for six or seven months during which the wife was on a visit to England, until 1880, when she discovered that her husband was having an adulterous intercourse with one of their female servants. She thereupon left Argentina, and came to London to live with her mother. The plaintiff, having remained in Buenos Ayres until 1885, came in that year to Ireland for a short time; and before he returned to Argentina there was a reconciliation between him and his wife. It was then arranged that he should come home after he had sold his property in South America, and that they were to

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live together in this country. The plaintiff carried out this arrangement by realizing the greater part of his Argentine property, by coming back to his wife, and by residing with her first in London, then at Rosslare, and afterwards at Woodville, County Wexford, of which he obtained a lease, and on which he expended a considerable sum of money. If he had continued to live in Ireland, there might have been no litigation; but, unfortunately, after some time he went back to Argentina to sell some stock that remained undisposed of. I gather from what afterwards took place in the Probate and Matrimonial Division that during his absence the old temptation was too strong for him, for when he returned to Ireland his wife presented a petition to Judge Warren praying for a divorce *a mensâ et thoro* on the ground of adultery, and she succeeded in obtaining the decree sought for. There had been previously a petition for alimony *pendente lite*, but an agreement was then entered into providing that all proceedings in the cause in reference to alimony, whether *pendente lite* or permanent, claimed by the wife, and also all claims in respect of the costs of the proceedings, should be settled on the terms of plaintiff paying the defendant the sum of £500, and assigning to her the lands of Woodville, and the chattels thereon. This consent also provided that in consideration thereof the wife should execute a deed releasing the plaintiff from all claims present and future by the defendant in respect of the relief sought by her in the action before Judge Warren and the costs thereof, and in respect of alimony, and in respect of any debts or liability incurred, or to be incurred, by her, and from all claims whatever by or on account of her, and indemnifying the plaintiff against the same.

Immediately after this litigation the plaintiff returned to Argentina, where he has since lived and prospered. He has become very wealthy; and, in 1895, his wife, finding it hard to subsist on what was provided for her by the consent, visited Buenos Ayres for the purpose of obtaining, if possible, some further provision; and, without litigation, the plaintiff agreed to give her £100 a year, which has been since regularly paid. His prosperity has apparently gone on increasing; and the defendant, in April, 1903, instituted proceedings in the Court of the Argentine Republic, which, according to the statement of claim,

seek for divorce, division of property, and alimony, against the plaintiff.

The present action is brought—(1) for a declaration that the final decree of Judge Warren, in 1888, was a binding sentence of divorce *a mensa et thoro* between the plaintiff and defendant; and (2) for an injunction to restrain the defendant from instituting or continuing any proceedings for divorce, or separation of goods, in the Court of the Argentine Republic against the plaintiff. The Master of the Rolls, I need hardly say, refused to give the declaration asked for, which is too fantastic to call for comment; but he granted the injunction on terms which do not substantially differ from what was claimed by the plaintiff. From this the defendant has appealed; and I am of opinion that she is entitled to succeed.

The plaintiff's claim for the injunction is based upon the consent entered into in the Probate and Matrimonial Division, and the indenture executed in pursuance thereof on the 3rd January, 1889. A document, said to be registered in 1895 in some office in Argentina, relating to the payment of the annuity of £100 already mentioned, was produced during the trial in the Rolls Court, but it is not relied on in the pleadings or in the arguments in this Court; and I do not propose to refer to it. I deal with the case upon the only ground put forward by the plaintiff—the contents of the consent and indenture.

Now, I have no doubt that the High Court in this country has jurisdiction to restrain the defendant from commencing or continuing a suit before a foreign tribunal, the object of which is to enforce against her husband a right from which she has released him by these documents. But whether this jurisdiction will be exercised, depends upon all the circumstances of the case. The injunction, although it only binds the defendant, has the effect of preventing a foreign Court from entering on or proceeding with litigation within its jurisdiction; and this is a step which British Courts are, and ought to be, slow to take. Justice may require it to be taken in some cases; but is the present one of them? Argentina has been the home of the plaintiff for almost forty years; and all his property is in that State. It is, therefore, the natural place in which a person, who claims a legal right against

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him, would take steps to enforce it. The defendant's suit was begun in April, 1903; and had been proceeding for two years and eleven months before the writ in this action was issued. During this period the parties were not idle, as the plaintiff says that the record of the proceedings has attained to great dimensions; and I gather from his evidence that he has himself contributed considerably to its bulk. All the documents are in Argentina, and the defendant was examined there in November last. We are told that the case would have been ripe for trial next month; but the plaintiff, having been defeated in an interlocutory appeal, came to Ireland, and brought this action. A plaintiff seeking an injunction, which will have the effect of putting a stop to a suit long pending, and soon to be tried, in a foreign country, ought at least to give some evidence of the nature of such suit, and the steps that have been taken in it, and also offer some reasonable explanation of why, after much expense and trouble have been incurred, he seeks to transfer the litigation to a country thousands of miles from his own residence, and from where all his property is situated. He has not done this. The only document produced by him from the Argentine Court is what is called the petition of the defendant, but which seems to me to be more like a speech of counsel. He proves that he has pleaded as a defence the deed of 1889; and it is not suggested by his counsel that this would not be a good answer to the action in the foreign Court, if it has the effect of releasing him from what his wife now claims. If the circumstances of this case were reversed, if the parties were natives of Argentina, and the judicial separation followed by the consent and deed had been obtained and executed there, an English or Irish Court would allow the husband to show, if he could do so, that an action therein brought against him by his wife was a violation of what was then agreed to. I do not know the law of Argentina; but I presume it to be a scientific system, and that it does not differ from our own in recognizing an elementary principle of jurisprudence.

For all these reasons, I should be prepared to hold, even if there was no other ground for doing so, that the injunction ought not to be granted. The Court is entitled, in a case like this, to consider whether the plaintiff is to put a summary stop to legal

proceedings which he has allowed to go on for so long without objection, and whether, having failed to change the venue of the action from one province of Argentina to another, he should now be permitted to bring it to Ireland. I can find no precedent resembling even remotely in its circumstances the present case; and I think one ought not now to be made.

There is, however, another ground for dismissing this action. It appears from the statement of claim therein that one of the objects of the foreign suit is to obtain division of property. We have no expert evidence as to what this means in Argentine law; but the plaintiff himself gave some answers, which can be used for the purpose of showing what it is. He said: "All the property that was gained during the marriage, *gamancia*, belongs to both, and the partnership is called 'Sociedad conjugale,' . . . everything except legacies or inheritance. The husband is the administrator of the property, and he is the managing partner." He afterwards said that the partnership remains until it is dissolved by a competent Court, and added that the "Sociedad" is dissolved by a decree for divorce; but after stating that there is no absolute divorce as in England, he went on to say—"I think the divorce only affects the personal separation of the couple. The 'Sociedad,' I believe, ends with it. I cannot remember that I have taken the opinion of a lawyer on the point." He says a little later that his wife claimed in the pending action a separation of goods, and the ascertainment of her share in the property. Now it is to be noted that the witness stated without doubt or hesitation that all the property gained during the marriage, except by legacies or inheritance, belongs to both husband and wife, the husband being the managing partner. In this case all the property of which the plaintiff is now in possession in Argentina was gained during the marriage, and after the deed of 1889. Therefore, unless the judicial separation makes a difference, this property belongs to the husband and wife jointly; but the plaintiff was in doubt as to the effect of the divorce. He cannot say whether it puts an end to the wife's rights or not—nor, in the absence of all other evidence of Argentine law on the subject, can this Court say. But suppose that in the words of the plaintiff the divorce only affects the personal separation of the couple, the wife

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is entitled to an undivided share of the property, which is as much her own as if the property had been conveyed to her and her husband as joint tenants.

Now, turning to the consent of 1888, I think that it is clear that it only relates to alimony, the costs of suit, and the claims arising in, or connected with, the action. I agree that it substitutes for alimony the benefits conferred on the wife by its terms, and the wife could not afterwards claim from her husband alimony, or anything in the nature of alimony—in other words, money for her subsistence. As the deed purports in its recitals to be the deed stipulated for in the consent, I am disposed to think that it goes no farther; but, even if I were to accept Mr. Samuels' construction that it releases all her rights in her husband's property, including the rights she would have therein if he were to die intestate, it certainly does not give him anything that is her own. But if I am to accept the plaintiff's evidence, the property acquired during coverture belongs to the two jointly. Her share thereof belongs to her just as his share belongs to him; and what she seeks for in her suit is a separation of goods, and an ascertainment of her share of the acquired property. I am satisfied that this right, if it exists under the law of Argentina, has not been affected by the consent or deed; and if, in ignorance of that law, I were to prevent the matter from being decided by a Court that is acquainted with it, I might be doing serious injustice to a lady who, as far as I can see, has done nothing calculated in law or morals to forfeit her rights, whatever they may be.

Solicitor for the plaintiff: *George Carr Lett.*
Solicitors for the defendant: *M. J. O'Connor & Co.*

R. D. M.

IN RE O'BRIEN; O'BRIEN *v.* O'BRIEN.

M. R.
1905.
Dec. 16.

Appeal.
1906.
Feb. 14.

Will—Construction—Bequest of house furniture and whatever is in the house—Sum of money in the house at death—Held not to pass under bequest—Residuary clause—Scope of will—Words ejusdem generis.

The will of a testator contained the following bequest:—"I bequeath my house furniture, and whatever is in the house I now dwell in, and in the house adjoining, so far as it belongs to me, to my sister R." By codicil the testator revoked the bequest to R., and substituted therefor a bequest in identical terms to M.

The testator (amongst other legacies) gave £500 each to R. and M., and there was a residuary clause in the will, by which the testator directed that the residue of his property, which he estimated at "over £5000," should be divided amongst the pecuniary legatees in proportion to the amount bequeathed to them respectively.

The testator was in the habit of keeping in a box in his house various sums of money, fluctuating in amount, and after his death a sum of £320 in cash was found in this box:—

Held, that the sum of money found in the box in the testator's house at his death did not pass under the bequest to M., but fell into the residue.

BY his will, William O'Brien, of Limavady, county Derry, made the following bequest:—"I bequeath all my house furniture and whatever is in the house I now dwell in, and in the house adjoining, so far as it belongs to me, to my sister Roseanne Doherty." By a codicil executed on the day after the will was signed, the testator revoked the bequest and bequeathed the same property to William Murphy, in the same terms.

By his will the testator gave some pecuniary legacies, differing in amount and in no case exceeding £500, to several persons, one legacy of £500 being given to Roseanne Doherty, and one legacy of £500 to William Murphy.

The will contained a residuary clause by which the testator directed that the residue of his property (which he estimated at "over £5,000") should be divided amongst his pecuniary legatees "not strictly share and share alike, but in the proportion of the money bequests to them to whom I have made money bequests,

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so that those to whom I have bequeathed £500 shall get five times as much as those to whom I have bequeathed £100." Internal communication existed between the house occupied by the testator and the adjoining house, which was occupied by a relative.

After his death, a sum of £320 was found in a box in the testator's residence. Evidence was given showing that the testator kept in his house a box which usually contained money to meet outgoings and requirements, fluctuating in amount between £4000 and little or nothing.

The question for decision was whether the sum of £320 found in the box in the testator's house passed to William Murphy under the terms of the will and codicil, or fell into the residue.

Wylie, K.C., and *G. W. Walker*, for William Murphy :—

The words of the gift are extensive, and are sufficient to pass the money found in the house. General words will not be limited to property *ejusdem generis*, such as that stated or enumerated in a will, where the enumeration only precedes the words in question, nor where there is no enumeration beyond the mention of one specified portion of property: *Mahony* v. *Donovan* (1); *Swinfen* v. *Swinfen* (2); *Arnold* v. *Arnold* (3). *Campbell* v. *M'Grain* (4) is distinguishable. There there was an enumeration of different classes of property: the testator bequeathed all "my estate and interest in said dwelling-house, together with all my household furniture, plate, linen, and all other effects therein." Here the single word "furniture" occurs as in *Swinfen* v. *Swinfen* (2), and that decision shows that where there is a bequest particularized by one word, followed by general words, the latter will not be restricted to things *ejusdem generis*: *Chapman* v. *Hart* (5); *Roberts* v. *Kuffin* (6); *Popham* v. *Lady Aylesbury* (7); *Sanders* v. *Earle* (8). There was a residuary devise in the will in *Arnold* v. *Arnold* (9), so nothing turns on that point.

(1) 14 Ir. Ch. R. 262, 388.
(2) 29 Beav. 207.
(3) 2 Myl. & K. 365.
(4) I. R. 9 Eq. 397.
(5) 1 Ves. Sen. 272, at p. 273.
(6) 2 Atk. 112.
(7) 1 Ambl. 68.
(8) 2 Ch. Rep. 98.
(9) 2 Myl. & K. 374, 375.

Henry, K.C., and *Osborne*, for Roseanne Doherty:—

The money found in the testator's house does not pass to William Murphy under the bequest to him. The latter words of the bequest indicate a gift of things *ejusdem generis* with the furniture; and a sum of money is so different in character from household furniture that it must be excluded from the operation of the bequest: *Campbell* v. *M'Grain* (1). There is a residuary clause in this will to aid this construction: as there was in the last-mentioned case. There was no gift of the residue in *Mahony* v. *Donovan* (2) or *Swinfen* v. *Swinfen* (3), and these cases are distinguishable from the present. In *Arnold* v. *Arnold* (4) no doubt there appears to have been a gift of the residue; but the words there were "my wines and property in England," which are very different from those in the present will.

The intention of the testator in this case would be defeated by adopting the construction contended for by the other side, for he has in his will made an estimate of the value of his property which shows that he treated the money found in his house as separate and distinct from furniture and such like. In this case the terms of the will control and circumscribe the generality of the words, and this is a sufficient ground in itself for holding that they operate so as to exclude the money found in the testator's house from the bequest to William Murphy, even if the words were in themselves sufficient to pass it. On this point see *Roberts* v. *Kuffin* (5) and *Sanders* v. *Earle* (6). In *Popham* v. *Lady Aylesbury* (7) there was nothing to raise the implication of the doctrine of *ejusdem generis*. *Chapman* v. *Hart* (8) is really a decision in our favour on the facts of the present case.

Law Smith, K.C., and *Chadwick* appeared for other parties interested.

Alexander Lane, for the executors.

(1) I. R. 9 Eq. 397.
(2) 14 Ir. Ch. R. 262, 388.
(3) 29 Beav. 207.
(4) 2 Myl. & K. 365.
(5) 2 Atk. 112.
(6) 2 Ch. Rep. 98.
(7) 1 Ambl. 68.
(8) 1 Ves. Sen. 270, 272, note *f*.

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The Master of the Rolls (after disposing of another question arising for decision) :—

The second question is a much more difficult and important one. I do not say that it is a clear case; but I think the answer to this must be in the negative, and that not on the authority of any decided case, for cases on the construction of wills, though they may be guides, sometimes afford but little help in arriving at the meaning of any particular will. The principle with which one is to approach the construction of wills is thus laid down by Lord Halsbury in *Inderwick* v. *Tatchell* (1). He says: "My Lords, I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. By the hypothesis it does not speak for itself; but you must arrive at some interpretation which will make it speak, and make it speak intelligibly. I so far go with the contention of the appellants here, that I think it is quite possible—nay, I may go further and say I think it is probable—that if the testator had contemplated the particular event that has happened in this case, he would have provided for it. But with that single observation, I am not at liberty, because an event has happened which I think has not been provided for, to conjecture what the testator would have provided if he had thought of it beforehand. I am not at liberty to disregard the application of the ordinary rule of construction of every document, namely, that you must look at the whole document; and, if you can, you must read the words according to their natural and reasonable meaning."

That is the principle upon which wills ought to be construed, and I have no doubt that when, in course of our legal history, the special services of Lord Halsbury come to be maturely and impartially considered, the general opinion of the profession will be that he has done more good by his constant adherence to the language

(1) [1903] A. C. 122.

testators have used, and the sense in which they have used it, and by giving effect to the real meaning apart from technicality, than in any other branch of law to which he has brought to bear his great intellect and power.

Taking the language alone, and if it stood alone, the clause in the will, which is altered in the codicil so far as the name of the person is concerned and not otherwise, is as follows :—" I bequeath all my house furniture, and whatever is in my house I now dwell in, and in the house adjoining, so far as it belongs to me, to my sister Roseanne, that is, Mrs. Doherty."

The testator changed his mind about the person who was to receive this bequest, for on the next day he made a codicil in which he says :—" I withdraw and annul the bequest I have made of my house furniture, and whatever is in my house I now dwell in, and in the house adjoining, so far as it belongs to me. I withdraw and annul that bequest I made to my sister, Roseanne, and I bequeath all my house furniture, and whatever is in the house I now dwell in, and in the house adjoining, so far as it belongs to me, to William Murphy." Now, upon the literal construction of these words, Mr. Walker forcibly argued that here is a gift which would capture the money. It was money in the house, and the money is a thing " in the house," and, therefore these words are wide enough to carry the money in question. But that is not the sole question in the case. The question is, what, on the whole will, is the meaning ? Did the testator mean that this considerable sum of money was to pass ? I entirely question the existence of any such general abstract rule as that general words cannot be cut down by a statement of things *ejusdem generis* unless an enumeration of more than one species follows. Let us see the words he uses—" I bequeath all my house furniture " (it was suggested that meant house-furniture ; but this was, of course, not pressed), " and whatever is in the house I now dwell in."

The testator appears to have kept in his house a box which usually had money in it. I must take the evidence to that effect along with the other evidence, and the evidence is that at times he had as much as £4000 in the box, and at other times little or nothing, and under these circumstances in the case of a man whose property in the house was fluctuating

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so much as between £4000 and little or nothing, is it to be said that these words must cover everything that was in the box, and that he intended to pass that by these general terms? But that is not all, because he says—"all my house furniture and whatever is in the house I now dwell in, and in the house adjoining, *so far as it belongs to me.*" Catherine O'Brien says there was a door of internal communication between the two houses. Anyone reading these words would understand that he meant to bequeath such furniture as might be partly in his own house and partly in the adjoining house, so far as it belonged to him. That is, he gives all his household furniture, of course not including anything belonging to his sister. I think that shows that what he was thinking of was things *ejusdem generis*, in his house or in the adjoining house occupied by his sister, things belonging to him which might be in one house or the other, so far as they did belong to him. The only other construction would be that "it" referred to the house, which it does not; but refers to the contents of the house, so far as belonging to him. If the contention of Mr. Walker be right, then the sum of £4000, if in the house at the time, would have passed to William Murphy. Does the testator mean that cash in the house to the extent of £4000 is to pass? It is clear he did not so intend.

By the residuary clause he directs the residue of his property, "which may amount, taking money due to me, to over £5000," to be divided amongst the pecuniary legatees. He puts an estimate on the value of the residue, taking money due to him and in his possession, and proceeds to say that it is over £5000. Suppose that the whole of this £5000 had chanced to be in the box at the time of his death (as it well might), would that be included in the legacy or in the residuary gift?

I think it is clear he was treating the money as something distinct and separate from the furniture and whatever was in the house. It was impossible to know what that would amount to unless he had made up his mind that a certain fixed sum should be in the house at his death.

There is a third clause which points to the same construction. This legatee, William Murphy, takes a legacy of £500

cash ; that is a circumstance referred to in the older cases as tending to narrow the rule that the general words subsequent to an enumeration of particulars in the case of property given to the same individual are to be construed in their wide sense. I do not think that it is any longer to be regarded as at any rate a crucial test, and I shall deal with the case apart from that. Take then this will—here is a man who gives a substantial legacy of £500 ; and we find that by the residuary clause he directs that the residue of his property shall be divided, "share and share alike, not strictly at all share and share alike, but in the proportion of the money bequests to them to whom I have made money bequests, so that those to whom I have bequeathed £500 would get five times as much of the residue as those to whom I have bequeathed £100." Now, suppose William Murphy gets £500 under this bequest in the will, and £4000 in the box, that £4000 would have passed in the shape of money, and William Murphy would in respect of it have been included in the class of pecuniary legatees. Was he to rank in the proportion named as a pecuniary legatee to the extent of £4500 ? That cannot have been the intention of the testator.

The case does not fall within any of the authorities cited, and I must do what I can to give effect to what the testator meant by this particular will, and, for the reasons mentioned, I decide that this money in the box did not pass to William Murphy.

R. W. L.

William Murphy appealed to the Court of Appeal.

The Court of Appeal (Walker, L.C., FitzGibbon and Holmes, L.JJ.) dismissed the appeal, with costs.

Solicitors for William Murphy : *M'Mahon & Tweedy.*
Solicitors for the executors : *B. H. Lane & Co.*
Solicitors for the legatees : *Henry & M'Connell.*

R. ST. J. C.

M. R. 1906. July 9, 10.

In the MATTER of a CONTRACT, dated the 27th March, 1906, for the SALE of a FARM OF LAND, between MICHAEL HIGGINS and JAMES STEPHENSON; and In the MATTER of THE VENDOR AND PURCHASER ACT, 1874.

(1906. No. 608.)

Vendor and purchaser—Title—Sale of leaseholds by administrator—Lapse of twenty years since death of intestate—Possession of next-of-kin—Administrator's power to sell.

The owner of a farm held for a term of years died intestate in 1883. In 1884 his widow took out administration to him, and died in 1890 without having sold the farm. On her death one of the children of the intestate entered into possession of the farm; in 1892 he purchased it under the Land Purchase Acts, and became the registered owner. In 1895 he became bankrupt, but the farm was not claimed by the assignees, as he made a declaration that he held it as trustee for himself and his brothers and sisters. He remained in possession until his death, which took place later in 1895. In 1906 his brother M. took out administration to him, and also took out administration *de bonis non* to his father.

M., as administrator of his father, put up the farm for sale by auction, and S. became the purchaser. S. required the concurrence of the next-of-kin of the intestate, unless M. could show that he was selling to pay debts of the intestate:—

Held, that the vendor could not make title without the concurrence of the next-of-kin.

Summons.

This was an application by Michael Higgins for a declaration (1) that good title had been made to the premises comprised in the contract for sale in accordance with the conditions of sale. (2) That the requisitions of James Stephenson had been sufficiently answered, and that the costs of and incidental to the application should be provided for.

The facts of the case were as follows:—

William Higgins, father of Michael Higgins the vendor, held

a farm of land, known as Ivy Lodge, in the Barony of Granard and county of Longford, containing 17A. 3R., statute measure, held under a lease for a term of thirty-one years, from March 25th, 1857, subject to the yearly rent of £15.

William Higgins died on November 17th, 1883, intestate, leaving Anne M. Higgins, his widow, and several children, amongst whom were William C. Higgins and Michael Higgins. On March 17th, 1884, Anne M. Higgins took out administration to William Higgins; she died on November 1st, 1890. After her death William C. Higgins entered into possession of the farm, and remained in possession till his death on August 25th, 1895. On August 3rd, 1892, William C. Higgins purchased the fee-simple of the farm under the Land Purchase Acts, and was registered as the proprietor thereof, subject to equities, under the Local Registration of Title (Ireland) Act, 1891. William C. Higgins became a bankrupt in the month of February, 1895. The farm was not treated as property of William C. Higgins, as he made a declaration that he held it as trustee for himself and his brothers and sisters. On March 15th, 1906, Michael Higgins took out administration *de bonis non* to his father, William Higgins, and also took out administration to his brother William C. Higgins. The farm was put up for sale by auction by the direction of Michael Higgins, subject to particulars and conditions of sale, which stated that the farm was the property of Michael Higgins, as representative of William Higgins, deceased, and held in fee-simple, subject to an annuity of £7 17*s.* 4*d.*, payable to the Irish Land Commission for a certain number of years. The farm was purchased by George F. Montgomery, solicitor, in trust for James Stephenson, for the sum of £715.

The conditions of sale material to the case were as follows:—

"(6) The premises were purchased under the Land Purchase Acts in the name of William C. Higgins, deceased, but it shall be assumed and accepted, and the purchaser shall take it, that the said William C. Higgins purchased the said premises as trustee for himself and his brothers and sisters, and the purchaser shall be bound to accept a statement from the vendor that the said William C. Higgins was merely a trustee of the said premises,

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and no requisition shall be served in respect of the right of the said William C. Higgins to purchase the said premises as such trustee as aforesaid.

"(7) The said William C. Higgins was adjudicated a bankrupt, and died before obtaining his certificate of conformity. The Bankruptcy Court did not treat the said farm as an asset of the said William C. Higgins, and the purchaser shall accept a statement from the vendor that the Court of Bankruptcy did not take the said farm, and, beyond the said statement from the vendor, the purchaser shall not ask, or call for, any further or better evidence of the said Court not having taken the said farm.

"(8) The purchaser shall not require the notes as to the rights or equities, if any, mentioned or appearing on the folio or register to be discharged from such folio or register, nor serve any requisition in respect of the same; nor shall the purchaser require the title of the said Michael Higgins as such representative to be registered under the provisions of the Local Registration of Title (Ireland) Act, 1891."

The purchaser (amongst other requisitions) required that, as over twenty years had elapsed since the death of William Higgins, it should be shown that the vendor was selling for administration purposes, and that he must show the existence of debts, or get the assent of the whole of the next-of-kin.

The vendor declined to comply with this requisition, and took out the summons above mentioned.

Christie, for the vendor:—

The rule as to twenty years does not apply in the case of the sale of a chattel real; the personal representative can sell for purposes of administration, not merely for payment of debts: *Re Venn & Furze's Contract* (1), followed by Madden, J., in *Re Anderson* (2); *Duffy* v. *Duffy* (3), where the Court of Appeal held that a farm was assets, though more than twelve years had elapsed.

Greer, for the purchaser:—

There was no personal representative of William Higgins

(1) [1894] 2 Ch. 101. (2) 36 I. L. T. R. 175. (3) [1906] 1 I. R. 205, 213.

between November, 1890, and March 19th, 1906, when Michael Higgins took out administration to his father, William Higgins. Before that date the farm had ceased to be assets of William Higgins. William C. Higgins was in possession of it, and on his own admission held it as trustee for himself and his brothers and sisters. His possession was that of the other next-of-kin. Once the next-of-kin of an intestate have acquired a title to a farm by virtue of the Statute of Limitations, the subsequent taking out of administration by one of them to the intestate cannot make it assets: *Re M'Clure & Garrett's Contract* (1); *M'Glynn* v. *M'Glynn* (2), *per* Johnson, J., on the hearing of a civil-bill appeal. In *Re Venn & Furze's Contract* (3) there was only a lapse of time. *Re Anderson* (4) is against my contention, but it was an *ex parte* decision. The next-of-kin are tenants in common: *Martin* v. *Kearney* (5), *per* Palles, C.B. They should join in the conveyance, or the vendor should show that there are debts to be paid.

Christie, in reply:—

The cases cited are not in point. In *Martin* v. *Kearney* (5) the only question was whether the next-of-kin, who had been in possession for the statutory period, were tenants in common or joint tenants. Ross, J., in *Coyle* v. *M'Fadden* (6), had decided that they were joint tenants; but Palles, C.B., refused to follow that case, and held that they were tenants in common. Here William C. Higgins was in sole occupation, and his administrator is selling, as he may do, though more than twenty years has elapsed since the death of the original tenant.

THE MASTER OF THE ROLLS:— July 10.

I am of opinion that the vendor cannot, without the concurrence of the next-of-kin of William Higgins, his father, make title to the premises in question. The dates here are important.

(1) [1899] 1 I. R. 225.
(2) 35 I. L. T. R. 132.
(3) [1894] 2 Ch. 101.
(4) 36 I. L. T. R. 175.
(5) *Ibid.* 117.
(6) [1901] 1 I. R. 298.

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William Higgins, the tenant of the farm, died on November 19th, 1883, intestate, leaving Anne M. Higgins, his widow, and several children, of whom the vendor is one, him surviving. On March 17th, 1884, administration to his estate was taken out by his widow, Anne M. Higgins. If she had been selling, *Re Venn & Furze's Contract* (1) would have applied. But she died on November 1st, 1890, and the estate remained derelict for nearly sixteen years, till 1906. What happened in the meantime? William C. Higgins, who is dead, son of William Higgins, went into possession of the farm, and on August 3rd, 1892, purchased the fee-simple under the Land Purchase Acts. He afterwards became bankrupt, and stated and represented in the bankruptcy proceedings that he was a trustee of the farm for himself and his brothers and sisters; he does not say for the next-of-kin; and his brothers and sisters may or may not have been the only next-of-kin of William. He (William C.) died in 1905, and on March 15th, 1906, his brother, Michael Higgins, the present vendor, took out administration *de bonis non* to the estate of his father, William Higgins, and also administration to his brother, William C. Higgins. Michael Higgins seeks to force this title on the purchaser on the ground that he can sell as personal representative of William Higgins. Perhaps a good title could have been made under the Statute of Limitations to his own interest by any person in possession between 1890 and March, 1906. I have not to decide that question. Here the persons beneficially interested were out of possession, save William C. Higgins, who stated that he was a trustee for himself and them. This statement was made by him in the bankruptcy proceedings against him, with the result that the assignees in bankruptcy admitted the truth of it, and did not think it worth while to realise his share. Besides, there is nothing to show that the estate of William Higgins was not administered in or before 1885, and, under the circumstances, I think it probable that it was. I think, therefore, that a good title has not been made, though I am of opinion that it can be made if the next-of-kin of William Higgins will join in the sale.

(1) [1894] 2 Ch. 101.

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The following order was made:—

"THE JUDGE doth declare that good title has not been made by the said vendor to the premises comprised in the said contract, in accordance with the said conditions of sale, and that good title cannot be made without the concurrence in the conveyance of the said premises of all the persons beneficially interested in the said premises. And it is ordered that the said vendor do pay to the said James Stephenson his costs of this application and order, when taxed and ascertained."

Solicitor for the vendor: *Louis C. P. Smith.*

Solicitor for the purchaser: *G. F. Montgomery.*

W. L.

IN THE MATTER OF THE ESTATE OF JOSEPH HATTON CARROLL.

Ross, J. 1906.

Nov. 14.

Land Purchase Acts—Irish Land Acts, 1903 (3 *Edw.* 7, *c.* 37), *section* 48; 1904 (4 *Edw.* 7, *c.* 34), *section* 3—*Estate solvent as to income—Sale to tenants—Insufficiency of proceeds to pay Board of Works charge—Percentage payable to vendor.*

At the date of the passing of the Land Act, 1903 (3 Edw. 7, c. 37), an absolute order for sale by the Land Judge was in force in respect of the estate of O., which estate was then insolvent both as to capital and as to income. In 1904 a portion of the estate was sold by the Land Judge to C., who sold same to the occupying tenants under the Act of 1903. The estate in the ownership of C. was solvent as to income; but, on a sale by C. to the tenants, the purchase-money, after redemption of superior interests, proved insufficient to discharge the redemption value of a Board of Works loan:—

Held, that a percentage, under section 48 of the Land Act, 1903, was payable to C.'s executors.

Held, further, that they took the percentage absolutely, excluding the Board of Works.

ALLOCATION.

An absolute order for sale by the Land Judge was in force at the date of the passing of the Land Act, 1903, for the sale of the estate of Daniel Ottley and others, which estate was at that time insolvent both as to capital and as to income. The estate was put up for

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sale by auction in 1904 in six lots. Five lots were sold by auction. The remaining lot, being the lands of Rockfort, was afterwards sold by the Land Judge to J. H. Carroll, the date of the Land Judge's conveyance being 13th July, 1904. J. H. Carroll thereafter agreed to sell the lands of Rockfort to the occupying tenants for the sum of £2650. The Estates Commissioners advanced this amount, and the purchase was completed. From the affidavits it appeared that there was a net income of at least £7 coming from the estate to J. H. Carroll, after paying all outgoings and instalments on a Board of Works loan. The capital value of the superior interests and Board of Works loan amounted to £2808 7*s.*, with the result that, unless the percentage were added to the purchase-money, there would be a deficit as regards the redemption-value of the Board of Works loan.

The matter now came before the Court on notice of motion on behalf of the executors of J. H. Carroll, for an order declaring them entitled to the percentage payable under section 48 of the Land Act, 1903, calculated at the rate of 12 per cent. on the sum of £2650, and that the same should be paid to them. The matter was, by direction of Mr. Justice Meredith, transferred to Mr. Justice Ross for argument.

H. D. Conner, K.C., and *Norwood*, for the vendors:—

Carroll's estate is not an "estate so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price." If Carroll's estate had been sold by the Land Judge, he (Carroll) would have been consulted as to price. The fact that Carroll sold at a sacrifice to his tenants, so that the purchase-moneys were, after redemption of superior interests, insufficient to discharge the Board of Works loan, would not render the estate insolvent *per se*. The Land Judge might, on a sale, have obtained a much higher price.

The definition of the word "estate" in the Land Act, 1903, section 98, does not apply to section 48. Carroll's estate was not the subject of the order for sale by the Land Judge. It is solvent as to income, consequently the proviso in sect. 48 (1) does not apply. The vendors are entitled to the bonus free and dis-

charged from all claims: Land Act, 1904, s. 3; *In re Ely's Estate* (1); *In re Minhear's Estate* (2).

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the Treasury:—

There was an absolute order for sale by the Land Judge in force at the date of the passing of the Act of 1903 in respect to this estate, which at that time was insolvent, therefore no bonus is payable: Land Act, 1903, s. 48 (4).

Edmond Coll, for the Board of Works:—

This is an insolvent estate; the bonus should be added to the purchase-money. The Board of Works have a charge on the lands: 10 Vict. c. 32, s. 22.

[Ross, J., referred to the Land Act, 1896, s. 31 (8).]

The vendors must hold the bonus on the trusts affecting the purchase-money, one of which is a trust to pay this charge: Land Act, 1904, s. 2.

Ross, J.:—

The Act of Parliament recognizes that it is for the public good that some pecuniary consideration should be given to owners of estates to induce them to sell to their tenants. It is necessary in the case of solvent estates, where the owner is in receipt of an income which would be lessened if he sold to his tenants. It is still more necessary in the case of an insolvent estate, because, if the owner is to get nothing out of the estate, he would not take the trouble to sell at all.

By the first part of sect. 48 of the Act of 1903 it is clearly enacted in the case of every estate, whether solvent or insolvent, pecuniary inducement is to be given. Sub-sect. 4 establishes a series of exceptions to the general rule, and, unless the Crown can get strictly within one or other of these exceptions, the bonus must be paid. The Crown insists that this land is an "estate so circumstanced that it would, independently of the Act of 1896,

(1) [1904] 1 I. R. 66. (2) 31 I. L. T. R. 215.

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ESTATE.

be sold without the consent of the owner as to price," and "in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Act of 1903." That argument can only stand on the assumption that the word "estate" means the lands; but the definition of the word "estate" in sect. 98 of the Act is plainly not to be applied to a section of this kind, which is dealing with an estate in the Land Judge's Court, and the subject of an absolute order for sale. "Estate" in the Land Judge's Court does not mean "lands," but the interest of some particular owner in the lands.

In 1903 it was the estate of Ottley, but when it gets into the hands of a subsequent purchaser, Carroll, it is not *the estate*, but a different estate. It is the interest of Carroll in lands which were formerly Ottley's, whose interest, and not Carroll's, was the subject of an absolute order for sale. I cannot hold that this is a blot on the lands, preventing for ever the bonus from being paid. In the case of a new purchaser, he requires an inducement to sell to his tenants, and the contention of the Crown, that no bonus is payable, must fail.

The contention of the Board of Works is a different and much more formidable one. It is most inequitable that the money should be paid out to these gentlemen without discharging their claim. The estate in Carroll's hands is solvent as to income, and is therefore not within the proviso of sect. 48 (1) of the Act of 1903. The Board of Works have a superior interest; but the bonus is not the purchase-money. There is a great difference between purchase-money and bonus. There is no fiduciary relation between the vendor and the Board of Works. There are express words in the Act of 1904, inserted with the object of inducing the vendor to sell. He is to get the percentage into his own hands; but the sub-section does not stop there. He is to get it "as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold, or the purchase-money thereof, and from any trust affecting the same" (sect. 3 (1), Act of 1904). I am, with the greatest reluctance, obliged to hold that this "gift from the gods" is not available to pay off the Board of Works charge, but goes into these gentlemen's hands for their own use and benefit. This is the effect of express

enactment, the result of which is that the Board of Works cannot prevent them from obtaining the whole percentage for their own use and benefit.

Ross, J.
1906.
In re
CARROLL'S
ESTATE.

Solicitors for the vendors: *W. Guest Lane & Co.*

Solicitor for the Treasury and for the Board of Works: *W. M. Lane.*

D. M. S.

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ANTICIPATION—*continued.*
half-year to sell such amount of said stock as, together with the dividends received, would amount to half the annuity, and to pay the proceeds of such sale to the annuitant:—*Held*, that, under the circumstances of the case, the application should be granted. *In re Dolling's Estate* - - - - MEREDITH, J., 379

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BONUS—*continued.*
ownership of *C.* was solvent as to income; but, on a sale by *C.* to the tenants, the purchase-money, after redemption of superior interests, proved insufficient to discharge the redemption value of a Board of Works loan:—*Held*, that a percentage, under s. 48 of the Land Act, 1903, was payable to *C.'s* executors. *Held*, further, that they took the percentage absolutely, excluding the Board of Works. *In re Carroll's Estate* - - - Ross, J., 661

2. —— *Land Purchase Acts—Irish Land Act*, 1903, *sect.* 48, *sub-sect.* 4—*Undivided moiety of estate insolvent; life estate of vendor in other undivided moiety insolvent, but remainder expectant thereon solvent.*] Where, in the case of an estate sold under the provisions of the Irish Land Act, 1903, it appeared that one undivided moiety, to which the vendor was absolutely entitled, was insolvent, and that the life estate of the vendor in the other undivided moiety was insolvent, but that the remainder expectant on the determination of the vendor's life estate in the latter was solvent, on a question arising as to whether the bonus was payable under the provisions of sect. 48. *Held*, that the case did not come within the provisions of sub-section 4 of section 48, and, accordingly, that the bonus was payable. *In re Howlin's Estate* - - - - - Ross, J., 300

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2. —— *Will—"Religious purposes"—Scotch Law.*] A testator bequeathed to his trustees a sum of money, upon trust to invest it and apply the income for such religious purposes as his trustees and the Bishop of *C* for the time being should, in their uncontrolled discretion, think fit. By a clause in the will immediately preceding this bequest the testator bequeathed a like sum of money to his trustees for the benefit of such charitable institutions connected with the counties of *C* and *D* as his trustees and the Bishop of *C* for the time being should, in their uncontrolled discretion, think fit, irrespective of creed:—*Held*, that the words "religious purposes" meant religious purposes which were charitable, and that the bequest was not void for uncertainty. *Grimond* v. *Grimond* ([1905] A. C., H. L. Sc., 124) is a decision upon Scotch law, and does not affect the rule laid down in *White* v. *White* ([1893] 2 Ch. 41), and earlier cases, that a bequest for a religious purpose is *prima facie* a bequest for a charitable purpose. *Arnott* v. *Arnott* (*No.* 2) M. R. 127

3. —— *Will—"Roman Catholic purposes"—General charitable intent—Christian Brothers—Gift for teaching—Monastic Order.*] Bequest to trustees in trust "for such Roman Catholic purposes in the parish of Coleraine and elsewhere as they deem fit and proper":—*Held*, by the Master of the Rolls and the Court of Appeal, that the bequest was void. Bequest in trust for the establishment in the parish of Coleraine of "a community of Christian Brothers for teaching purposes":—*Held*, by the Master of the Rolls, void. No appeal was taken on this question. *MacLaughlin* v. *Campbell* M. R. 588; APP. 594

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CONGESTED ESTATE—*Land Purchase Acts—Irish Land Act*, 1903—*Purchase under sect.* 6 (4)—*Expenditure thereon from Reserve Fund—Sect.* 43 (2) *and* (3)—*Recoupment—Obligation on Treasury to make regulations—Sect.* 44.] Where the Estates Commissioners proposed to purchase an estate under the provisions of sect. 6 of the Irish Land Act, 1903, which was a congested estate within the meaning of that section, and on which, in their opinion, a considerable expenditure from the Reserve Fund was expedient and necessary, and further proposed, with the consent of the owner, to certify to the Lord Lieutenant that the purchase and re-sale of the estate were desirable in view of the wants and circumstances of the tenants thereon, and, in the event of the Lord Lieutenant determining that a loss might be incurred on the re-sale thereof within the limits permissible under sect. 44, to offer to the owner a certain sum for the estate; on questions arising (1) whether, under sect. 43, it was within the sole discretion of the Treasury to give or withhold by regulations the benefit of recoupment referred to in sub-sect. 3 of that section? and (2) whether, in the event of any sums being expended from the Reserve Fund for the benefit or improvement of the estate, such sums would be made good by the National Debt Commissioners by advances to the Land Commission for repayment to the Reserve Fund, pursuant to sect. 43 (2) and (3)? *Held* (1), that under sect. 43 an obligation is imposed on the Treasury to make regulations which meet the exigencies of the case, and that they are bound to fulfil this obligation; and (2) that it is the *enhanced price of parcels* consequent on improvements that is referred to in sect. 43 (3), and accordingly that any sums expended out of the Reserve Fund on the improvement of parcels of the estate, should, if the sale of such parcels resulted in an enhanced price, be recouped in the manner provided for by sub-sections 2 and 3 of that section, to the extent represented by the increase of price of the said parcels consequent upon such improvement. *In re Warden's Estate* [MEREDITH, J., 434

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CONSPIRACY—*continued.*
action, and that therefore an injunction should be granted, but that under the circumstances there was no need for an inquiry as to damages, as the amount was ascertained by the plaintiff's own evidence. *Sweeney* v. *Coote*
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COVENANT FOR FURTHER ASSURANCE—*Landlord and tenant—Statutory covenant against assignment—7 Geo. 4, c. 29—Assignment without consent of landlord—Statute of Limitations, effect of—Statutory tenancy—Graft.*] By lease, dated the 5th October, 1827, *E. V.* demised to *J. S.* the lands of *A.* for three lives or thirty-one years. By indenture, dated the 25th January, 1855, *E. J. S.* (in whom the lessee's interest was vested) assigned the lands to *O.*, the consent of the lessor not having been obtained. *O.*, having entered, continued in possession until the 7th December, 1888, when he obtained an order fixing a fair rent for the holding, making the holding a present tenancy. On the 30th September, 1876, *O.*, on the occasion of the marriage of his son, *H. H. O.* assigned the lands to trustees on trust for himself for life, then for *H. H. O.* for life, with an ultimate trust (in the events which happened) for the children of *H. H. O.* in equal shares. The deed contained a covenant by *O.* for further assurance. *H. H. O.* died in 1881 and his wife in 1882, leaving three children, the plaintiffs, who were then minors. In September, 1888, *O.*, on the marriage of his daughter with the defendant *F.*, and in consideration of £300, agreed to assign the lands to *F.* and his wife, subject to the landlord's consent, which was obtained in January, 1889. The defendants had notice of the settlement of 1876. *O.* died in 1896, the plaintiffs being still minors. In an action to carry out the trusts of the settlement of the 30th September, 1876:—*Held*, that *O.*, by getting a fair rent fixed, was estopped from denying that he was assignee of the lease; that the conversion of the lease into a statutory tenancy in 1888 put an end to the applicability of the Act of 7 Geo. 4, c. 29; that whatever interest in the lands was vested in the defendants was bound by the trusts of the settlement of 1876, of which the defendants had notice; and that *O.*'s covenant for further assurance bound him, on obtaining the statutory tenancy in 1888, to give effect to the trusts of the settlement of 1876, provided the legal tenancy was dealt with in the manner provided by the Land Acts. Decision of the Master of the Rolls affirmed. *O'Connor* v. *Foley* - - - - - - - App. 20

COVENANT TO RENEW—*Lease for lives renewable for ever—Assignment—Specific performance—23 & 24 Vict. c. 154, ss. 14, 15.*] The defendant, who was assignee of the lessee's interest in a lease for lives renewable for ever, assigned his interest to *H.* on March 7th, 1905, and gave notice in writing of the particulars of the assignment to the plaintiff, in whom the lessor's interest was vested, on March 14th, 1905. The gale-day next following the date of the notice was May 1st, 1905. On April 4th, 1905, an equity civil bill was brought to obtain specific performance of the covenant to renew:—*Held* (affirming the decision of the County Court Judge), that the assignment to *H.* was valid and binding on the landlord, and that, it not being in the power of the defendant to effectively perform his part of the covenant to renew, a decree for specific performance should not be given. *Moffett* v. *Greene* - - - - - - Barton, J., 501

DEBENTURES—*Company — Borrowing powers — Floating charge—Power of Company to deal with property — Pledge — Priority.*] A Distillery Company, with power to create debentures and to borrow on mortgage, issued debentures, and executed a trust deed to further secure the debentures. By the debentures the undertaking, and all the property, present and future, of the Company (not comprised in the trust deed) were charged with the moneys borrowed as a first charge thereon. By the conditions endorsed on the debentures, the Company was to be permitted, until default in payment of interest, &c., in course of its business, and for the purpose of carrying on same, to deal with the property thereby charged in such manner as the Company might think fit, and in particular might sell, lease, or exchange the same, pay and receive money, and might declare and pay dividends out of profits, but nothing therein should be taken to authorise the creation of any mortgage or charge on the property for the time being of the Company in priority to the charge thereby created. By the trust deed the Company mortgaged the freehold and leasehold premises of the Company to secure the repayment of the debentures to the lenders *pari passu*, and the Company covenanted to pay the principal and interest secured by the debentures, and that the same should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the Company by any means whatsoever. The Company obtained advances from their bankers to enable them to purchase grain for the purpose of manufacturing whisky, to secure the repayment of which the Company pledged to the Bank certain whisky, by delivering to the Bank the warrants for the whisky, with invoices:—*Held* (affirming the decision of Barton, J.), that the transaction came within the restriction against creating any mortgage or charge on the property in priority to the debentures, and the provision that the debentures should take precedence over all moneys which might be raised by the Company by any means whatsoever, and that the Bank were not entitled to the whisky against the debenture-holders. *Held*, also, on further evidence produced in the Court of Appeal, which had not been given in the Court below, that the Bank had notice of the debentures at the date of the pledge of the whisky to them, and were consequently not in the position of purchasers for value without notice. *Cox* v. *Dublin City Distillery Co.* [App. 446

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FEE-FARM GRANT—*Land Purchase Acts—Lands held under fee-farm grant—Covenant reserving benefit to grantor in event of mines being worked—Agreement for sale—Interest in covenant.*] A grantee under a fee-farm grant entered into an agreement to purchase the lands therein comprised under the Land Purchase Acts. The mineral rights were vested in the grantee by virtue of the grant. The said lands lay amongst other lands comprised in the estate, held under ordinary judicial and other tenancies. There were underlying the estate valuable minerals, which had from time to time been, and were at the time of sale being, worked by the vendor. The fee-farm grant contained a covenant by the grantee that if at any time thereafter the mines or quarries underlying the lands therein comprised should be worked, or any profit derived therefrom, he would pay a royalty-rent to the vendor. On a question arising as to whether, under the agreement for sale, the vendor was entitled to retain his interest in the said covenant: *Held*, that, by excluding from the sale the mines and quarries and the covenant in relation thereto, he was so entitled. The following clause in the agreement for sale, reserving to the vendor his interest in the said covenant, was approved and adopted:—"The exclusive right of mining and taking minerals within the meaning of the said Act, and of digging and searching for the same, having been vested in the tenant by the said fee-farm grant, the same, together with the right of the vendor under the covenant by the grantee in the said fee-farm grant contained, in the event of the mines or quarries being leased or worked by the grantee, to receive a rent equal to one moiety of any royalty or other rent that may be derived by the grantee, is excluded from the sale." *In re Ranfurly's Estate* - - MEREDITH, J., 169

2. —— *Practice—Land Judge—Incumbrance—Jurisdiction—Sale of land to pay arrears of fee-farm rent.*] The appointment several years ago of a receiver for the purpose of recovering the arrears of a fee-farm rent having proved an insufficient remedy, the Court ordered a sale of the lands. *In re Cullen's Estate*; *Irwin, Petitioner* [ROSS, J., 508

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FISHERY — *Landlord and tenant — Sporting rights—Judicial tenancy—Reservation to landlord of exclusive right of fishing—Natural obstruction thereto—Remedies of landlord as to removal of same.*] The exclusive right of fishing in a river, where it flowed past the holding of a judicial tenant, was reserved to the landlord by the order fixing the fair rent. Some sallies and thorn-bushes were growing

FISHERY—*continued.*
on portion of the river bank, so as to prevent fishing unless cut and lopped from time to time. Their only use to the tenant was the stability which their roots gave to the bank. The practice had always been to cut them from time to time, so as to prevent interference with the fishing; and the normal and reasonable condition and user of the bank, prior to and at the date of the aforesaid order, had been such as to enable the landlord to exercise his right of fishing and at the same time to maintain the stability of the river-bank. After the fixing of the fair rent the sallies and bushes grew to a height which rendered impossible the reasonable exercise by the landlord of his right of fishing. The tenant refused to cut them, or to allow the landlord to do so:—*Held*, that the landlord had a right of entry for the purpose of cutting the sallies and bushes, so far as might be necessary for the reasonable exercise of his fishing rights, but so as not to interfere with the stability of the bank. *Held*, also, that in the circumstances of the case the landlord was not entitled to a decree having the effect of a mandatory injunction to compel the tenant to cut the sallies and bushes; but that his remedy was to enter and cut them, if tenant did not do so. *Palmer* v. *Byrne* BARTON, J., 373

FORECLOSURE — *Without sale — Practice — Mortgage — Special circumstances — Bonus.*] The Chancery Division has jurisdiction to decree foreclosure and not a sale in a mortgagee's suit, but will only exercise such jurisdiction under exceptional circumstances. The plaintiffs, in an undefended mortgagee's suit, sought a decree that, in default of payment of the principal and interest secured by the mortgage on a day to be named, the defendant should stand foreclosed of all right or equity of redemption in the mortgaged premises. The mortgage was made to secure the entire of the purchase-money of the lands, which had been advanced by the mortgagee to the mortgagor. The plaintiffs alleged that the rents were insufficient to keep down the interest on the mortgage debt; that the proceeds of a sale at twenty-five years' purchase would be insufficient to discharge the said debt, even if the plaintiffs became entitled to the bonus on a sale to the tenants (which was the avowed object of seeking foreclosure), and that there was no other mortgage affecting the premises:—*Held*, by Barton, J., and by the Court of Appeal, that these circumstances were not sufficient to justify the Court in departing from its settled practice to order a sale and not foreclosure. *Bruce* v. *Brophy.* - - BARTON, J., 611; APP. 615

FOREIGN ACTION — *Jurisdiction — Action brought by defendant in foreign country — Prior action—Release—Agreement not to sue—Injunction.*] The plaintiff, an Irishman by domicil, married the defendant in 1874 at Buenos Ayres. They lived

FOREIGN ACTION—*continued.*
there until 1880, when the defendant left the plaintiff on account of his adultery, and came to live with her mother in London. In 1886 the plaintiff sold the greater portion of his property, which was situated in Argentina, returned to England, and was reconciled to his wife. He took a residence with some land in the county of Wexford, and lived there with his wife until 1888, when he went to Buenos Ayres, realized the rest of his property, and returned to Ireland. On the 24th September, 1888, the defendant filed a petition against the plaintiff for divorce *a mensa et thoro* in Ireland, and she also filed a petition for alimony *pendente lite*. On the 17th December, 1888, the defendant obtained a decree for divorce. A consent was then signed by plaintiff and defendant, which was made a rule of Court on the 17th December, 1888, and provided that all proceedings in reference to alimony, *pendente lite* or permanent, and all claims for costs, should be settled on the terms that the plaintiff should pay £500 to the defendant, and should execute to her an assignment of his interest in the Wexford property, and that the defendant should execute a deed releasing the plaintiff from all claims present or future by the defendant against him in respect of the relief sought by her in the said cause, or in respect of costs or of alimony, *pendente lite* or permanent. A deed was executed on the 3rd January, 1889, to carry out these terms. The plaintiff returned to Argentina, where he acquired considerable wealth, and, in 1895, in consequence of a threat by the defendant to institute proceedings to obtain a larger allowance, the plaintiff agreed to give her an annuity of £100 a year, which was paid to her thenceforward. In 1903 the defendant instituted proceedings against the plaintiff in the Argentina Republic, claiming divorce and maintenance. The plaintiff, having come to Ireland in 1906, brought an action against the defendant, who was still residing in Wexford, for an injunction to restrain her from proceeding with the action in the Argentine Court:—*Held* (by Sir Samuel Walker, C., and FitzGibbon, L.J.; Holmes, L.J., *dissentiente*), affirming the decision of Sir A. M. Porter, M.R., that an injunction should be granted, as the suit in the Argentine Court was against the terms of the consent of the 17th December, 1888, and the deed of the 3rd January, 1889. *Lett* v. *Lett* [M.R. 618; APP. 630

FORESHORE—*Lands bounded by sea—Space between high and low water—Owner's right of access to sea across such space—Private right—Right of navigation—Obstruction thereto—Injunction.*] An owner of lands bounded by the sea has a private right of access thereto for the purpose of navigation. Such right is not limited to the period of the day when the sea is in contact with his lands, but includes a

FORESHORE—*continued.*
private right of access to the sea across the portion of the foreshore left bare by the receding tide. An improper obstruction of such owner's right to use the foreshore for the purposes of navigation will be restrained by injunction. *Coppinger* v. *Sheehan.* [BARTON, J., 519

FRAUD—*Mortgage—Purchase for valuable consideration without notice—Constructive notice—Independent solicitor—Past consideration—Innocent trustee.*] *A.*, who was found as a fact to be a person of limited intelligence, and incapable of understanding the effect of legal instruments, was induced by the fraud of his agent *F.*, to assign, by deed in 1892, all his property to *F.*, subject to and in consideration of (*inter alia*) an annuity of £200, payable to him for life. In the present action, brought by the heiress-at-law and personal representative of *A.*, this deed was set aside. *F.*, in 1896, mortgaged the property to a bank, *A.* joining in the deed to postpone his annuity. The bank, who had no knowledge of the state of *A.'s* intelligence, or that the deed of 1892 was procured by the fraud of *F.*, but who were put on inquiry by facts appearing on the surface of the deed of 1892 and by other circumstances within their knowledge, made no inquiry, and allowed *A.* to execute the deed without being represented by an independent solicitor:—*Held*, that, as against the plaintiff, the bank could not rely on the defence of purchase for valuable consideration without notice. *F.* mortgaged the property in 1901 to *M.* to secure a sum of £8000, then due by *F.* to *M.* *M.* had no notice of the infirmity of *F.'s* title, and made no inquiry:—*Held*, that *M.*, being a purchaser for a past consideration, had no equity sufficient to prevail against the plaintiff's title. In 1886, *I.* and *R.*, co-trustees of *F.'s* marriage, advanced £500 of the trust moneys to *A.* on a mortgage of *A.'s* property, thereby enabling *F.* to defraud *A.* of the said sum of £500. *I.* had no knowledge or notice of the state of *A.'s* intelligence:—*Held*, assuming *R.* to have had such knowledge, and to be guilty of a fraud, that such fraud could not be imputed to *I.*, and that the mortgage could not be set aside by the plaintiff. *Aldritt* v. *Maconchy & Others* Ross, J., 416 [APP.]

GALE DAYS—Jointure—First payment—Appointment - - - - 533
See APPORTIONMENT.

GRAFT—*Expiration of lease—New letting to executrix—Tenant for life—Purchaser for value—Notice of facts creating equity.*] The widow and executrix of a testator, to whom he had bequeathed a farm held for a term of years for life, and after her death to her nephew, was accepted as yearly tenant by the landlord at an increased rent after the expiration of the term. She afterwards sold her interest to her brother, reserving a room in the house for herself. The brother, who was aware of the will of the testator and of the circumstances of the new letting, went into possession and paid the rent, but receipts were given in the name of the representatives of the testator. After the death of the widow the nephew brought an action against her brother, to have the yearly tenancy declared a graft on the lease:—*Held*, that it was a graft. *Dempsey* v. *Ward* ([1899] 1 I. R. 463) distinguished. *In re Egan*; *Egan* v. *Stack* - M.R. 320

——Administrator—Next-of-kin - 205, 213
See LIMITATIONS, STATUTE OF. 1.

——Statutory tenancy - - - - 20
See COVENANT FOR FURTHER ASSURANCE.

GRANDCHILDREN—Legacy to—Illegitimate children - - - - - 487
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HABENDUM—Omission of words of limitation—Deed—Conveyancing Act - 607
See FEE-SIMPLE.

HOLDING—Alteration in—Land Law Act, 1881, s. 21 - - - - - - 1
See PRESENT TENANT.

HUSBAND AND WIFE—Insurance by wife in favour of husband—Payment of premiums by husband—Death of husband in lifetime of wife—Property in policy—Married Women's Property Act, 1882, s. 11 - - - - - 155
See POLICY OF INSURANCE.

——Jointure—Fixed days of payment—First gale—Apportionment - - - 533
See APPORTIONMENT.

——Separation deed—Agreement not to sue
See FOREIGN ACTION. [618, 630

——Settlement—Trust for husband for life or till bankruptcy or execution - - 482
See SETTLEMENT.

ILLEGITIMATE CHILDREN—*Will—Children—Gift to grandchildren—Reputation.*] By her will, dated the 11th May, 1901, testatrix bequeathed to her daughter two houses in Dublin for her life for her separate use, so that she should not have power while under coverture to dispose of the same, and after her death to such of her children as the daughter should appoint, and, subject to any such appointment, to all her children in equal shares. She bequeathed another house in Dublin to *C.* for life, and after her death to her said daughter for her life, subject to the same powers and limitations as the other two houses, and after the death of the said daughter to her children. She left the residue of her property to her said daughter. The daughter had children by concubinage—admitted, for the purposes of the case, to be illegitimate—all of whom were under the age of twenty-one. Their mother (testatrix's daughter), with these children, resided in a small house close to the residence of

ILLEGITIMATE CHILDREN—*continued.*
the testatrix, and they frequently took their meals and spent most of the day with her. There was evidence to show that the testatrix treated the children as her grandchildren. The testatrix died on the 30th June, 1901, and her daughter died on the 2nd March, 1902:—*Held*, that, havin regard to the surrounding circumstances, there was a sufficient indication of intention to show that the testatrix used the word "children" as including illegitimate children. *O'Loughlin* v. *Bellew* [L. C. 487

IMPROVEMENTS — Included in agreed purchase money—Advance refused by Land Commission - - - - - 515
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INCORPORATION — Plans — Local statute — Construction - - - - - 560
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INCUMBRANCE—Arrears of fee-farm rent—Sale—Jurisdiction, Land Judge - 508
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INDEMNITY—Representation that settled lands are unincumbered—Purchaser for value of unsettled lands—Mortgage - 305
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See FRAUD.

INFANT — Action by next friend — Alleged neglect and collusion in conduct of—Suits by same party when of full age 578, 584
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INFRINGEMENT—Of patent—Inspection 383
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See CONSPIRACY. [51, 92

—— Local Act—Deviation from deposited plans
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See FORESHORE.

—— Staying foreign action - - 618, 630
See FOREIGN ACTION.

INJURY—Conspiracy - - - - 51, 92
See CONSPIRACY.

INNOCENT TRUSTEE—Fraud - 416
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INSURANCE.
See POLICY OF INSURANCE.

INTEREST ON MONEY—Arrears recoverable—Covenant not to sue till happening of contingency - - - 220, 224
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—— Sale of freehold premises—Vacant possession Non-completion on appointed day—Wilful default - - - - - 287, 477
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INTEREST ON MONEY—*continued.*
—— Statute of limitations—Part payment—Presumption where owner of mortgage is also owner of part of mortgaged lands 370
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JOINT POWER—Contingent sole power—Covenant to exercise - - 220, 224
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JOINT TENANCY — Next-of-kin — Statute-barred shares - - - - 469
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JOINTURE—Fixed gale days—First payment—Apportionment - - - 533
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JUDGMENT—Declaration of validity and effect of - - - - - 618, 630
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JUDICIAL TENANT—Reservation of right of fishing—Natural obstruction—Landlord's remedy - - - - - 373
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JURISDICTION — Chancery Division — Appointment of new trustees — Existing trustee—Vesting order - - 531
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—— Estates Commissioners—Declaration—Separate estate—Refusal—Zones - 42
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—— Estates Commissioners—Free grant for purchase of stock and implements - 493
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—— Estates Commissioners—Lands held by Rural District Council sublet—Inclusion in estate - - - - - 17
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—— Estates Commissioners—Purchase of wholly untenanted lands - - 186, 193
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—— Land Commission—Improvements by tenant included in purchase-money - 515
See LAND LAW (IRELAND) ACTS. 1.

—— Land Judge—Request by Estates Commissioners for particulars—Boycotting 137
See LAND LAW (IRELAND) ACTS. 3.

—— Land Judge — Sale—Incumbrance—Arrears of fee-farm rent - - - 508
See FEE-FARM GRANT. 2.

—— Taxing Master—Costs of Provisional Order—Parliamentary scale - - - 599
See TAXATION OF COSTS. 2.

LAND LAW (IRELAND) ACTS—*Agreements for sale — Arrangement that the purchase-money applied for should include a sum to be paid by the vendor to the purchasing tenant for improvements—Advance.*] Where, in the case of the sale of an estate to the tenants direct, under the Irish Land Act, 1903, agreements for sale to certain tenants at prices within the zones had (amongst others) been lodged with the Land Commission, and it appeared that it was part of the agreement in each case that the vendor, on receiving the purchase-money, should pay to the tenants certain specified sums for the purpose of enabling them to improve their holdings, and that in each case the improvements had been executed, while in one case the specified sum had been paid, and in another a sum on account had been paid, by the vendor. On a question arising as to whether the entire of the purchase-money agreed upon could be advanced under the Land Purchase Acts:—*Held*, that the entire purchase-money could not be advanced, but that the balance, after deducting the specified sums so agreed to be paid by the vendor in each case, could be advanced for the purchase of the holdings. *In re Crosbie's Estate* - MEREDITH, J., 515

2. —— *Purchase by the Congested Districts Board —Clause as to adjustment on allocation of the purchase-money in the event of a discrepancy in the rental being discovered — Claim by the vendor — Advance of the extra purchase-money claimed under the Land Purchase Acts.*] Where an estate was sold to the Congested Districts Board under an agreement which, *inter alia*, provided that "if any discrepancy should be discovered in the rental as set forth in the originating request, the same should be adjusted on the allocation of the purchase-money," but time was not of the essence of the contract, and when the purchase-money advanced in respect of the estate had been practically distributed, the vendor claimed to be entitled to compensation, on the ground that, in the originating request, the rental of the lands sold, on which the purchase-money had been calculated, had been erroneously stated, to her prejudice:—*Held*, that the clause in the agreement was one which applied as well in favour of the vendor as of the purchaser, and that the Congested Districts Board were bound to compensate the vendor for the extra value actually received:—*Held*, also, that, under the circumstances of the case, the Land Commission had jurisdiction to sanction the advance, under the Land Purchase Acts, of the extra purchase-money claimed. *In re Fallon's Estate* MEREDITH, J., 510

3. —— *Request by Land Commission for particulars—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37) *—Jurisdiction of Land Judge—Boycotting.*] Where a request has been made under sect. 7 of the Irish Land Act, 1903, to the Land Judge by the Land Commission for particulars of an estate as to which an absolute order for sale has been made, it is mandatory on the Land Judge to supply the particulars mentioned in sect. 7 to the Land Commission. If compliance with the request would endanger a pending sale, or would appear to the Land Judge to prove useless, the Land Judge can, in the exercise of his discretion, postpone taking action on the request until the Land Commission has been informed of the circumstances of the property, and has an opportunity of judging whether proceedings taken under sect. 7 are likely to prove effective; but the Land Judge cannot, in exercising his discretion, take into consideration the fact that the lands have been boycotted. *In re Galway's Estate* [APP. 137

4. —— *Reserve Fund—Jurisdiction of the Estates Commissioners to make free grants for the purchase of stock and implements—Irish Land Act*, 1903, *ss.* 12, 43.] The Estates Commissioners have jurisdiction to make free grants out of the Reserve Fund mentioned in section 43 of the Irish Land Act, 1903, to persons coming within the provisions of section 2 (1) (d) of the said Act, for the purchase of stock and implements. *In re Marquis of Lansdowne's Estate* - - MEREDITH, J., 493

5. —— *Rural district council—Lands held by, under a statutory letting, which are wholly sublet—Jurisdiction of the Estates Commissioners.*] There is no power under the Irish Land Act, 1903, or any of the Land Purchase Acts, to advance money for the purchase of labourers' plots either to a rural district council or to a weekly tenant. Where, on an estate proposed to be sold by the vendors to the tenants direct, under the Irish Land Act, 1903, there were certain lands held by a rural district council, under a statutory letting, which were wholly sublet to a weekly tenant, and where it was proposed to sell the said lands to the rural district council, on a question arising as to the jurisdiction of the Estates Commissioners in the matter:—*Held*, that the Estates Commissioners had jurisdiction to include the said lands in the estate, and to make a vesting order vesting the same in the rural district council, provided the purchase-money agreed upon was paid in cash by the rural district council to the credit of the matter. *In re Walters' Estate* [MEREDITH, J., 17

6. —— "*Separate estate*"—*Declaration—Jurisdiction of Estates Commissioners to refuse—Zones—Condition precedent to sale under the Act—Irish Land Act*, 1903, *ss.* 1, 98.] In the case of a proposed sale, under the Irish Land Act, 1903, by a landlord to his tenants direct, the agreements were for the sale of judicial tenancies at prices coming within the zone limits mentioned in section 1 of the Act. On a question arising as to the jurisdiction of the Estates Commissioners to refuse to declare the lands comprised in the originating application a "separate

LAND LAW (IRELAND) ACTS—*continued.*
estate" for the purposes of the Act, on the grounds—(1) that the security for the advances would be inadequate, and (2) that a number of the holdings were intermixed and in rundale:—*Held*, that the Estates Commissioners had jurisdiction on these grounds to refuse to make the declaration. *Held*, also, that the question of the zones did not affect their jurisdiction. *Semble*: In proceedings for the sale of an estate under the Irish Land Act, 1903, the declaration made in the proper exercise of their discretion by the Estates Commissioners or the Congested Districts Board, as the case may be, that the lands proposed to be sold are fit to be regarded as a "separate estate" for the purposes of the Act, is a condition precedent to any definitive step being taken in such proceedings for sale. *In re Scottish Union and National Insurance Company's Estate* - - - MEREDITH, J., 42

—— Bonus—Estate solvent as to income—Board of Works charge - - - 661
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—— Bonus—Insolvent estate—Mortgagee—Foreclosure - - - - 611, 615
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—— Bonus — Undivided moiety solvent — Life estate of vendor in other moiety insolvent, but remainder expectant thereon solvent
See BONUS. 2. [300

—— Congested estate—Purchase — Expenditure from Reserve Fund — Recoupment — Obligation on Treasury to make regulations—Land Act, 1903, ss. 6 (4); 43 (2), (3); 44 - - - - - - 434
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—— Fair rent—Declaration and agreement fixing —Application to file—Bona fides—Purchase agreement signed by tenant 48
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—— Sale to fee-farm grantee—Mines and quarries —Covenant to pay royalty — Exclusion
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See LAND LAW (IRELAND) ACTS.

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LANDS CLAUSES ACT—s. 80—Disentailing deed—Costs - - - - - 557
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LEASE—Assignment without consent of landlord—7 Geo. 4, c. 29—Statutory tenancy — Settlement — Covenant for further assurance - - - - - 20
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—— Building plots—Intended road—Abuttal—Grant of easement - - - 173
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—— For years—Rentcharge—Proviso for redemption—Remoteness - - - 399
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—— Renewable for ever—Conveyance of rent—Fines accruing before and after date of
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—— Sale by administrator — Lapse of twenty years from death of intestate—Title 656
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LEGACY—Of "house furniture and whatever is in the house"—Money—Words *ejusdem generis* - - - - 649, 655
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—— Of residue to executor—Whether conditional on acting - - - - 386, 394
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—— To grandchildren—Illegitimate children 487
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—— To Monastic Order—Invalidity 505, 539, 588,
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MONASTIC ORDER. 1, 2.

LIMITATION—Words of—Estate in fee 607
See FEE-SIMPLE.

LIMITATIONS, STATUTE OF — *Adverse possession of land by one of next-of-kin of deceased tenant—Character of such possession—Other next-of-kin in possession—Grant of administration more than twelve years from death of intestate—Graft.*] *J. D.* died intestate on the 28th August, 1885, leaving three children, Thomas, Mary, and Francis, all of whom were of age. He was possessed of three farms in the county of Monaghan, on the

LIMITATIONS, STATUTE OF—*continued.*
estate of the Marquis of Bath, and also of farming stock and chattels. At the time of his death Thomas and Francis *D.* were in delicate health, and the farms were managed by the daughter, Mary *D.* After his death the Bath estate was sold to the tenants under the Land Purchase Acts, and conveyances of two of the farms were taken to Thomas *D.* in June and July, 1887, and a conveyance of the third was taken to Mary *D.* in June, 1887. By the same conveyances the lands were mortgaged to the Land Commission, to secure the payment of the purchase annuities. In 1898, Mary *D.* became delicate in health, and Francis, who had recovered, took up the management of the farms, and possessed himself of all the assets of his father. On the 21st March, 1899, Francis *D.* obtained a grant of administration to his father, and in the schedule of assets he returned the farms as assets. In 1900 the annuities payable to the Land Commission fell into arrear, and the three farms were sold by auction to pay the arrears. They were bought in by Francis *D.* for the instalments due on each; and, in April, 1900, and in January and February, 1901, he obtained conveyances to himself of the three farms in fee. Francis *D.* died on the 2nd October, 1903, having, by will, left all his property to his wife (the defendant):—*Held* (affirming the decision of Barton, J.), that the purchase by Francis *D.* of the farms from the Land Commission was a graft on the former interests; that the farms were assets of *J. D.*, and that Francis *D.* had not acquired a title to the farms under the Statute of Limitations. *Duffy* v. *Duffy* - - BARTON, J., 205; APP. 213

2. —— *Intestacy—Farm—Next-of-kin in possession—Other next-of-kin out of possession for more than twelve years—Former entitled to shares of latter as joint tenants.*] The next-of-kin of an intestate, who remain on in possession of chattels real without taking out administration, acquire, under the Statute of Limitations, a joint tenancy in the shares of other next-of-kin who have remained out of possession for more than twelve years, although, in respect of their own original shares, they hold as tenants in common. *Martin* v. *Kearney* (36 Ir. L. T. R. 117) distinguished. *Smith* v. *Savage* - - - BARTON, J., 469

3. —— *Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Mortgage—Presumption of payment of interest by owner of portion of lands, being also owner or tenant for life of the mortgage—Effect of such payment as to the remaining portion of the lands.*] A fictitious payment presumed to have been made by the owner of an undivided portion of lands charged with a mortgage to himself, as owner or tenant for life of the mortgage, is not sufficient to prevent the Statute of Limitations from running in favour of a third party, owner of the remaining undivided portion. A mortgage for £1300, charged on leaseholds and other lands, became, in 1827, vested in the owner of three-fourths of the leaseholds. From 1827 to 1850 no actual payment of interest on foot of the mortgage was made by anyone:—*Held*, that, by the 8th section of the Real Property Limitation Act, 1874, the mortgage debt was barred as against the remaining fourth of the leaseholds. *In re Finnegan's Estate*; *Clarke and Others, Petitioners* - - - - - ROSS, J., 370

—— Interest—Arrears of - - - 220, 224
See POWER.

—— Lease—Covenant - - - - - 20
See COVENANT FOR FURTHER ASSURANCE.

LOCAL GOVERNMENT—Provisional Order—Costs—Taxation - - - 599
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MARRIAGE SETTLEMENT.
See SETTLEMENT.

MARRIED WOMAN.
See HUSBAND AND WIFE.

MARSHALLING—*Mortgage—Marriage settlement—Representation that lands are unincumbered—Contribution to charge—Right of settled lands to indemnity—Purchaser for value of unsettled lands.*] The owner of two estates subject to a mortgage settled one of them on his daughter's marriage. There was no covenant against incumbrances in the settlement, but a verbal representation was made previously to the execution of it by the settlor to the intended husband, that the estate was free from incumbrances, and it was conveyed without reference to incumbrances. The other estate passed under the settlor's will to his widow, who conveyed it to a purchaser for value, with notice of the settlement, but not of the verbal representation:—*Held*, that the purchased estate was bound to indemnify the settled estate from the mortgage debt. *Averall* v. *Wade* (Ll. & G. 252, temp. Sugden) followed. *Barnes* v. *Racster* (1 Y. & C. C. C. 401) explained and distinguished. *Tighe* v. *Dolphin* - - - - - M. R. 305

MASSES—Gift in perpetuity—No direction for celebration in public - - - 247
See CHARITY. 2.

MINES—Royalty on working—Fee-farm grant—Covenant—Sale to grantee—Land Purchase Acts - - - 169
See FEE-FARM GRANT. 1.

——Sale of, separately from land—Trustee Act, 1893, *s.* 44 - - - - 526
See TRUSTEE. 2.

MONASTIC ORDER—*Bequest to Superior of Franciscan Capuchin Order—Validity of—Roman Catholic Relief Act* (10 *Geo.* 4, *c.* 7).] A testator by his will directed that his trustees should divide "the remainder of my residuary estate equally between the Superior of the Franciscan

MONASTIC ORDER—*continued.*
Capuchin Monastery, at Rochestown, Co. Cork, in aid of the school there for the education of priests for the foreign mission, and the Superior of All Hallows College, Dublin, in aid of the school there for the education of priests for the foreign mission." There was no question as to the validity of the gift to All Hallows College:—*Held*, that the gift to the Superior of the Franciscan Capuchin Monastery for the education of priests "for the foreign mission" was not invalid as being contrary to the policy of the Roman Catholic Relief Act (10 Geo. 4, c. 7). *In re Murphy, Deceased: Murphy* v. *Hynes and Sire* - - BARTON, J., 505

2.——*Gift to—Charity—Legacy to Superior of Order—Void bequest*—10 *Geo.* 4, *c.* 7, *ss.* 28, 34.] Bequest to the Superior of the *R.* Convent, county of Cork, of a sum of £300 for the education of a priest for that community. Bequest to the Superior, Holy Trinity Church, Charlotte-quay, Cork, of a sum of £100 for that community. Evidence was given to show that the convent and church both belonged to the Franciscan Order:—*Held* (reversing the decision of Barton, J.), that both bequests were void. *Cussen* v. *Hynes* - - - - - APP. 539

—— Gift to Christian brothers for teaching purposes - - - - - 588, 594
See CHARITY. 3.

MONEY—*Will—Construction—Bequest of house furniture and whatever is in the house—Sum of money in the house at death—Held not to pass under bequest—Residuary clause—Scope of will—Words* ejusdem generis.] The will of a testator contained the following bequest:—"I bequeath my house furniture, and whatever is in the house I now dwell in, and in the house adjoining, so far as it belongs to me, to my sister *R.*" By codicil the testator revoked the bequest to *R.*, and substituted therefor a bequest in identical terms to *M.* The testator (amongst other legacies) gave £500 each to *R.* and *M.*, and there was a residuary clause in the will, by which the testator directed that the residue of his property, which he estimated at "over £5000," should be divided amongst the pecuniary legatees in proportion to the amount bequeathed to them respectively. The testator was in the habit of keeping in a box in his house various sums of money, fluctuating in amount, and after his death a sum of £320 in cash was found in this box:—*Held*, that the sum of money found in the box in the testator's house at his death did not pass under the bequest to *M.*, but fell into the residue. *In re O'Brien, Deceased; O'Brien* v. *O'Brien* [M. R. 649; APP. 655

MORTGAGE — Fraud — Constructive notice—Past consideration - - - 416
See FRAUD.

MORTGAGE—*continued.*
—— Insolvent estate—Foreclosure without sale—Special circumstances—Bonus 611, 615
See FORECLOSURE.

—— Marriage settlement — Representation that lands are unincumbered—Marshalling—Purchaser for value of unsettled lands 305
See MARSHALLING.

—— Tenant for life of, being owner of part of mortgaged lands—Presumed payment of interest—Effect of, on rest of mortgaged estate
See LIMITATIONS, STATUTE OF. 3. [370

NAVIGATION—Obstruction—Foreshore 519
See FORESHORE.

NEXT-OF-KIN—*Vendor and purchaser—Title—Sale of leaseholds by administrator—Lapse of twenty years since death of intestate—Possession of next-of-kin—Sale by administrator.*] The owner of a farm held for a term of years died intestate in 1883. In 1884 his widow took out administration to him, and died in 1890 without having sold the farm. On her death one of the children of the intestate entered into possession of the farm; in 1892 he purchased it under the Land Purchase Acts, and became the registered owner. In 1895 he became bankrupt, but the farm was not claimed by the assignees, as he made a declaration that he held it as a trustee for himself and his brothers and sisters. He remained in possession until his death, which took place later in 1895. In 1906 his brother *M.* took out administration to him, and also took out administration *de bonis non* to his father. *M.*, as administrator of his father put up the farm for sale by auction, and *S.* became the purchaser. *S.* required the concurrence of the next-of-kin of the intestate, unless *M.* could show that he was selling to pay debts of the intestate:—*Held*, that the vendor could not make title without the concurrence of the next-of-kin. *In re Higgins and Stephenson's Contract* - - - - - M. R. 656

—— Possession of chattel real by some—Exclusion of others—Administration more than twelve years from death of intestate 205, [213
See LIMITATIONS, STATUTE OF. 1.

—— Possession of chattel real by some—Exclusion of others—Joint tenancy - 469
See LIMITATIONS, STATUTE OF. 2.

NOTICE—Constructive—Fraud - - 416
See FRAUD.

—— Of facts creating equity — Purchaser for value - - - - - 320
See GRAFT.

OBSTRUCTION—Exercise of reserved sporting rights — Judicial tenancy — Fishery — Natural obstruction—Landlord's remedy [373
See FISHERY.

—— Foreshore—Private right - - - 519
See FORESHORE.

PARLIAMENTARY SCALE—Costs incidental to Provisional Order - 599
See TAXATION OF COSTS. 2.
PARTICULARS—Land Act, 1903, s. 7—Request of Estates Commissioners 137
See LAND LAW (IRELAND) ACTS. 3.
PART PAYMENT—Interest on mortgage—Mortgagee part owner of mortgaged lands
See LIMITATIONS, STATUTE OF. 3. [370
PAST CONSIDERATION—Mortgage for—Fraud—Whether purchase for value 416
See FRAUD.

PATENT—*Infringement—Practice—Application for inspection of machines relied on as anticipating plaintiff's patent—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 30.] In an action for infringement of a patent the Court has power, under section 30 of the Patents, &c., Act, 1883, to order inspection of a machine in the possession of the defendant relied on as evidence of publication of the alleged invention within the realm prior to the date of the plaintiff's patent. The defendants in an action for infringement of a patent for an improved machine for slicing German sausages, by their particulars of objections alleged that the invention was published within the realm prior to the date of the plaintiff's patent, by the manufacture, sale, and use of certain machines by several persons named in the particulars. The plaintiff applied to one of these persons for leave to inspect the machine so stated to have been made and used by him, and was informed that he had sold the machine to the defendants, and that it was in their possession. The plaintiff then applied to the defendants for leave to inspect the machine, which was refused. *Held*, that the Court had power to order an inspection of the machine, and that it was a proper case in which to make such an order. *Garrard* v. *Edge* (58 L. J. Ch. 397; 6 R. P. C. 372) discussed. *Van Berkel* v. *Booth* - - - M. R. 383

PAYMENT OUT OF COURT—*Practice—Costs—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 80—*Disentailing deed.*] The costs of a disentailing deed, which is necessary in order to obtain payment of a fund in Court lodged by a Railway Company, are payable by the Company, and a special order will be made as to such costs. *Ex parte Allen* (7 L. R. Ir. 124) not followed. *In re Navan and Kingscourt Railway Co. and Earl of Fingall* - - - - - M. R. 557

PERPETUITY—*Rule against—Creation of annuity charged on leaseholds—Rentcharge—Chattel interest—Term of 500 years—Proviso for redemption at fixed price—Remoteness.*] *J.* granted an annuity or rentcharge of £30 (Irish) a year, for a term of 500 years to trustees upon certain trusts, and charged same on leasehold premises, with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the 500 years, to purchase or redeem the annuity for £300 (Irish), which was then to determine and be void:—*Held*, that the proviso for redemption of the annuity did not infringe the rule against perpetuities, and was not void for remoteness. *Switzer & Co.* v. *Rochford* M. R. 399

—— Gift for Masses—No direction for celebration in public - - - - - 247
See CHARITY. 1

PETITION—Application for fee-farm grant—Dispute as to fines - - 159
See RENEWABLE LEASE.

PLANS—*Housing of the Working Classes Act*, 1890—*Public Health (Ireland) Act*, 1878—*Local Act—Purposes of—Deposit of plans—Extent of incorporation—Basis of compensation—Modification of plans—Injunction*—53 & 54 *Vict. c.* 70, *Part III.*—41 & 42 *Vict. c.* 52—63 & 64 *Vict. c. cxii L. & P.—Compulsory purchase.*] Prior to the passing of a Provisional Orders Confirmation Act, empowering the defendants to acquire compulsorily, from the plaintiffs and from others, certain lands for the purposes of Part III. of the Housing of the Working Classes Act, 1890, and for the purposes of the widening and improving of streets and roads, plans of the lands to be taken, one of which showed a ground-plan of forty-five cottages proposed to be built, a proposed "playground," and a proposed approach 50 feet wide, were duly deposited with the Local Government Board and in Parliament. Section 1 of the Provisional Order in question, which recited the deposit of the plans, described the lands to be compulsorily acquired as "the lands, easements, rights of way, and other premises described in the deposited plans and book of reference"; and the plans were referred to as "the plans showing the lands and premises required for the purposes aforesaid." The Act did not further or otherwise refer to the plans, and did not contain any provision requiring the defendants to carry out the works according to the plan. After the passing of the Act the arbitrator appointed by the Local Government Board assessed the compensation to be paid to the plaintiffs for purchase-money and for injury to adjoining lands, and the amount awarded was paid. Subsequently, modified plans for the building upon the acquired lands of a larger number of cottages, the use for that purpose of part of the space marked "playground," and the making of a 20-foot instead of a 50-foot approach, were prepared by defendants and approved by the Local Government Board, through whom the defendants were borrowing money for the carrying out of the works. On an application for an injunction to restrain the carrying out of the modified plans:—*Held*, that the deposited plans were incorporated in the Act only for the purpose of identifying the lands to be compulsorily acquired;

PLANS—*continued.*
that the defendants were, therefore, not bound to adhere to the representation of intention shown on the plan as to the proposed number of cottages, playground, and approach; and that the defendants could not be enjoined while they kept within the purposes mentioned in the Act. *Bradshaw and Falconer* v. *Bray Urban District Council*
[BARTON, J., 560 [APP.]

PLEDGE—Debentures—Priority - 446
See DEBENTURES.

POLICY OF INSURANCE—*Married Women's Property Act*, 1882, *s.* 11—*Insurance in favour of husband.*] A wife effected a policy on her own life in favour of her husband, under the Married Women's Property Act, 1882, for £1000. By the terms of the policy the insurance company promised to pay £1000 to the husband, or his executors, administrators, or assigns, on the death of the wife. The husband paid the premiums on the policy, and predeceased the wife:—*Held*, that the trust created by the policy and the Act in favour of the husband was not dependent on his surviving his wife, and that the policy belonged to his executors and not to his wife. *Prescott* v. *Prescott*
[M.R. 155

POSSESSION—Contract for sale—Non-completion on appointed day—Wilful default
See VENDOR AND PURCHASER. [287

POWER — *Execution — Joint power of appointment given to father and son — Contingent sole power of appointment given to son, if surviving—Covenant by son, in deed of arrangement with creditors, to exercise sole power—Equitable obligation — Covenant by creditors to forbear suing — Arrears of interest—Right to receive—Statute of Limitations*—3 & 4 *Wm.* 4, *c.* 27, *ss.* 40–42.] By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as *A* and *B*, subject to the life estate therein of *A*, during their joint lives, should by deed appoint; and in default of such appointment, to such uses as *B*, if he should survive *A*, should, after the death of *A*, by any deed, made after the decease of *A*, appoint; and in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which *B* took an estate tail. In 1868 *B*, who was then in pecuniary difficulties, executed a deed by way of arrangement with his creditors. This deed provided, as alternative securities, (1) a policy of insurance for £2500, effected on *B*'s life, payable in the event of his predeceasing *A*, which *B* assigned to trustees for the benefit of his creditors; (2) a covenant by *B*, that, if he survived *A*, and thereby became entitled to the lands, he would, within one month thereafter, grant and appoint the lands by way of mortgage to the use of the trustees, subject to redemption on payment of £2010, the aggregate

POWER—*continued.*
amount of the debts, with interest thereon at the rate of 5 per cent. This deed contained a grant by the creditors to *B* of full liberty to follow and attend to his business without any arrest, attachment, or execution against his person or estate by the creditors on account of any of their debts, the debt of any creditor acting contrary to such license to be forfeited and void. By deeds, executed in 1872 and 1880, *A* and *B*, in exercise of their joint power, mortgaged the lands, which latter mortgages were, by an order of the Court of Appeal ([1901] 1 I. R. 261), declared to be puisne to the deed of 1868. *A* died on the 8th April, 1899, prior to which a petition for sale was presented by the mortgagees under the deed of 1872, and the order for sale was made absolute on the 3rd September, 1889:—*Held*, by the Court of Appeal (reversing the decision of Ross, J.), that the trustees under the deed of 1868 were, on the 8th April, 1899, entitled to payment of the principal sum secured by the said deed, with interest thereon at the rate of 5 per cent. from the date of the deed of 1868, and were not precluded by the Statute of Limitations from claiming more than six years' interest prior to the date of the absolute order for sale. *In re Lambert's Estate* - ROSS, J. 220; APP. 224

PRACTICE — Declaratory judgment — Validity and effect of judgment of co-ordinate Court - - - - - 618, 630
See FOREIGN ACTION.

—— Injunction — Deviation from plans—Incorporation—Local Act - - - - 560
See PLANS.

—— Injunction—Obstruction to foreshore—Private right - - - - - - 519
See FORESHORE.

—— Injunction—Staying proceedings in foreign country—Release—Agreement not to sue
See FOREIGN ACTION. [618, 630

—— Inspection of alleged infringement—Patent action - - - - - - 383
See PATENT.

—— Land Commission — Covenant securing superior interest—Redemption - 550
See REDEMPTION.

—— Land Commission—Discrepancy in rental—Clause as to, in agreement for purchase by Congested Districts Board—Advance of extra money claimed by vendor - 510
See LAND LAW (IRELAND) ACTS. 2.

—— Land Commission — Improvements by tenant included in agreed purchase-money—Advance to that extent refused - 515
See LAND LAW (IRELAND) ACTS. 1.

—— Land Judge—Arrears of fee-farm rent—Sale - - - - - - 503
See FEE-FARM GRANT. 2.

PRACTICE—*continued.*
—— Land Judge—Particulars—Estates Commissioners—Request - - - 137
See LAND LAW (IRELAND) ACTS. 3.
—— Lands Clauses Act, 1845, s. 80—Disentailing deed—Costs - - - - 557
See PAYMENT OUT OF COURT.
—— Mortgage—Foreclosure without sale—Special circumstances—Bonus - 611, 615
See FORECLOSURE.
—— Petition—Fee-farm grant — Dispute as to fines - - - - - - 159
See RENEWABLE LEASE.
—— Security for costs—Relator without visible means - - - - - 473
See SECURITY FOR COSTS.
—— Staying proceedings—Former action between same parties for same cause 578, 584
See STAYING PROCEEDINGS.
—— Taxation of costs—Comparison of engrossment with draft conveyance - 478
See TAXATION OF COSTS. 1.
—— Taxation of costs—Provisional Order—Parliamentary scale - - - 599
See TAXATION OF COSTS. 2.
—— Trustee Act, 1893—New Trustee—Constructive trust - - - - 236
See TRUSTEE. 1.
—— Trustee Act, 1893—New trustees—Vesting order—Existing trustee - - 531
See VESTING ORDER.
—— Trustee Act, 1893—Sale of minerals separately from land—Form of order - - 526
See TRUSTEE. 2.

PRESENT TENANT—*Landlord and tenant—Agreement to become tenant of portion of holdings formerly held by tenant at an increased rent—Future tenant—Negotiation by agent for tenant—Land Law (Ireland) Act*, 1881, *s.* 21.] *F.* was tenant of three small holdings in the county of Monaghan, comprising about 12½ acres (Irish), at the rent of £4 15*s.*, held under three leases for lives, of which *F.* was the survivor. *F.* died in 1890, having by will left the farm to his wife, the present tenant. The landlord demanded possession, and on the 11th September, 1890, the tenant served originating notices to fix fair rents with respect to two of the holdings. Negotiations were then entered into, in which *M.* acted as agent for the tenant, which resulted in an agreement being made between the parties, dated the 18th February, 1891, by which the tenant agreed to become yearly tenant to the landlord of portion of the lands, consisting of 9 acres, comprised in the three original leases, at the rent of £14, a small portion being surrendered:—*Held* (by the Lord Chancellor and Walker, L.J.; *dissentiente* Holmes, L.J.), as the tenant had not authorised *M.*, as her agent, to resign her *status* as a present tenant, and as there was nothing in

PRESENT TENANT—*continued.*
the agreement inconsistent with the retention by her of her *status* as such, that neither the shrinkage in the area, nor the consolidation of the holdings, nor the alteration in the rent, destroyed the present tenancy which existed in 1890. *Thomson, Landlord*; *Hagan, Tenant* - - - APP. 1

PRESUMPTION—In favour of vesting 333, 353
See VESTING.
—— Payment of interest—Mortgagee owner of part of mortgaged lands - - 370
See LIMITATIONS, STATUTE OF. 3.

PRINCIPAL AND AGENT.
See AGENT.

PRIORITY—Debentures—Company—Pledge of assets - - - - - - 446
See DEBENTURES.

PRIVATE RIGHT — Foreshore — Obstruction—Injunction - - - - 519
See FORESHORE.

PROVISIONAL ORDER—Costs—Taxation—Parliamentary scale - - - 599
See TAXATION OF COSTS. 2.

PUBLIC CELEBRATION—No direction for—Masses—Gift for - - - 247
See CHARITY. 1.

PURCHASER FOR VALUE—Graft—Notice of facts creating equity - - 320
See GRAFT.
—— Marshalling against—Settlement—Representation that lands are unincumbered 305
See MARSHALLING.
—— Past consideration - - - - 416
See FRAUD.

QUARRIES—Royalty on working — Fee-farm grant—Covenant — Sale to grantee — Land Purchase Acts - - 169
See FEE-FARM GRANT. 1.

RECOUPMENT — Expenditure from Reserve Fund—Congested Estate - - 434
See CONGESTED ESTATE.

REDEMPTION—*Land Purchase Acts—Apportionment—Fixing of redemption price—Security—Personal covenant by original grantee to pay the rent.*] Where, in Land Purchase proceedings, an order has been made for the apportionment of a head-rent as between the lands sold and the other lands liable thereto, and for the redemption of the sum apportioned on the lands sold, in estimating the security for the purpose of fixing the redemption-price the Court will treat the sum to be redeemed as a separate rent issuing out of the particular lands on which it has been apportioned. The personal covenant by the original grantee to pay the rent, if of appreciable value, is an element to be taken into consideration in fixing the redemption price. *In re Stronge's Estate*
[MEREDITH, J., 550

REDEMPTION—*continued.*
—— Annuity—Restraint on anticipation — Insufficiency of income—Part payment out of capital - - - - - 379
See ANTICIPATION.
——Rentcharge on leasehold for years—Perpetuity, rule against - - - - - 399
See PERPETUITY.
REFUSAL TO CONVEY—Constructive trustee—Practice - - - - - 236
See TRUSTEE. 1.
REGULATIONS—Under Irish Land Act, 1903 — Obligation on Treasury to make 434
See CONGESTED ESTATE.
RELEASE—Rights in foreign country—Injunction - - - - - 618, 630
See FOREIGN ACTION.
RELIGIOUS PURPOSES—Will — Charitable bequest - - - - - - 127
See CHARITY. 2.
REMOTENESS
See PERPETUITY.
RENEWABLE LEASE—*Renewal fines—Conveyance of rent to grantee—Fines accruing due before and after date of conveyance — Lessor and lessee—Unity of title—Fee-farm grant—Renewable Leasehold Conversion Act—Practice—Petition.*] *A* was absolutely entitled to the lessor's interest in premises held under lease 'for lives renewable for ever. Prior to 1870 until his death in 1889 he was also tenant for life of the lessee's interest in same premises. On his death the lessor's interest vested in *B*, and the lessee's interest vested in *C*. In 1898 *B* conveyed the rent reserved by the lease to *D*. The *cestuis que vie* all died between 1870 and 1874. *C* applied to *D* for a fee-farm grant:—*Held*, that no fines which accrued due during the period that *A* was the owner of both the lessor's and the lessee's interest were now payable. That the fines which accrued due while *B* was entitled to the lessor's interest were payable to *B*, and the fines which accrued due since the date of the conveyance of 1898 were payable to *D*. In all cases where a dispute has arisen as to the amount of renewal fines, or as to whom they are payable, or in what proportions, a petition under the Renewable Leasehold Conversion Act is the proper method of procedure. *Ex parte Scott* [M. R. 159
RENEWAL—Lease—Covenant—Assignment
See COVENANT TO RENEW. [501
RENT—Fair—Declaration and agreement fixing
See FAIR RENT. [48
——Fee-farm—Arrears—Sale—Jurisdiction, Land Judge - - - - - 508
See FEE-FARM GRANT. 2.
—— Increase of—Expiration of lease—Present or future tenant - - - - - 1
See PRESENT TENANT.
RENT—*continued.*
—— Personal covenant to pay—Redemption 550
See REDEMPTION.
RENTAL—Discrepancy—Recoupment — Extra advance by Land Commission 510
See LAND LAW (IRELAND) ACTS. 2.
RENTCHARGE—Chattel interest—Proviso for redemption—Remoteness - - 399
See PERPETUITY.
—— Jointure—Fixed gale days—First payment—Apportionment - - - 533
See APPORTIONMENT.
REPRESENTATION—Settlement — Freedom from incumbrances - - - 305
See MARSHALLING.
REQUEST—Estates Commissioners—Particulars—Land Act, 1903, s. 7 - - 137
See LAND LAW (IRELAND) ACTS. 3.
RESERVE FUND—Expenditure on congested estate—Recoupment - - 434
See CONGESTED ESTATE.
—— Jurisdiction to make free grants for purchase of stock and implements - - 493
See LAND LAW (IRELAND) ACTS. 4.
RESIDUARY GIFT—Shares in proportion to pecuniary legacies - - 649, 655
See MONEY.
—— To executor—Whether conditional on accepting office - - - 386, 394
See EXECUTOR.
RES JUDICATA—Estoppel—Former action
See STAYING PROCEEDINGS. [578, 584
RESTRAINT—Anticipation - - 379
See ANTICIPATION.
ROAD—*Landlord and Tenant—Lease—Building plots—Plots to be intersected by "intended road"—Words of abuttal amounting to implied grant of easement.*] A lessor demised to a lessee two plots of ground, *A* and *B*, "with the rights, members, and appurtenances thereunto belonging, or in any wise appertaining," for ever, subject to a rent. Plot *A* was described, *inter alia*, as being bounded on the east by "an intended road, to be 38 feet wide, intersecting said lot from lot *B*," and lot *B* was, *inter alia*, described as being bounded on the west "by said intended road, 38 feet wide, intersecting said lot from lot *A*." Upon the map annexed to the lease the aforesaid intersecting passage was delineated as being 38 feet wide, and was described as a "proposed new road reserved by Dr. T.' (the lessor). The lease, which contained a covenant by the lessee to keep all buildings to be thereafter erected strictly as private dwellinghouses, was made in pursuance of a previous agreement in writing, "to take a lease of the plots marked *A* and *B* on the map annexed hereto." The map was an estate map of the lessor's estate laid out in building plots, and showed these plots, *A* and *B* marked in red, covered by terraces of houses, with a lane behind.

ROAD—*continued.*
The two plots *A* and *B* were shown, with the intersecting road, 38 feet wide, including two footpaths, 5 feet wide each. Written on the map were the measurements of the two lots, and the words—"The lots to be as is marked on map," with the signatures of the parties. The lessee erected a terrace of houses on each plot with a lane at the rear, into which the back doors of the houses opened. The lane communicated with the intersecting space, which in its turn led to a public road. The corner house of one of the lots had a side gate, giving access to the intersecting space. The intersecting space remained for thirty years dividing the two terraces, and affording access to and from them, and to and from the lane at the rear. The lessor, having abandoned the rest of his building scheme, and having no further use, in connexion therewith, for this intersecting road, advertised it for sale for building purposes, subject to an obligation by the purchaser to leave a passage 10 feet wide, connecting plaintiff's back lane with the public road. The plaintiff brought the action to restrain him from so doing:—*Held*, that from the words of the lease, describing with such particularity the abuttal of the two plots upon an intended intersecting road "to be" 38 feet wide, there was to be implied a grant of an easement of way to and from and across an intersecting space of that width, which imposed upon the lessor a binding obligation not to use the intersecting space for any purpose inconsistent with such grant; and that, consequently, plaintiff was entitled to an injunction. *Gogarty* v. *Hoskins* BARTON, J., 173

ROMAN CATHOLIC PURPOSES—Will—Charitable bequest - - 588, 594
See CHARITY.

ROYALTY—On working mines and quarries—Fee-farm grant—sale to grantee—Land Purchase Acts—Exclusion - 169
See FEE-FARM GRANT. 1.

RURAL DISTRICT COUNCIL—Lands held by—Weekly subletting—Inclusion in estate—Vesting—Cash payment - 17
See LAND LAW (IRELAND) ACTS. 5.

SCOTCH LAW—Religious purposes—Charitable bequest - - - - - 127
See CHARITY. 2.

SEA SHORE—Foreshore—Obstruction 519
See FORESHORE.

SECURITY FOR COSTS—*Practice—Relator—No visible means.*] Where an action is brought by a relator, at the suit of the Attorney-General, to have a public trust carried out, or a charitable scheme settled, and where it appears that the defendants have a defence to the action, or that there is some question to be tried, the Court will order the relator, if without visible means, to give security for costs. *Attorney-General* v. *Allman*

SEPARATE ESTATE—Refusal of Estates Commissioners to declare—Zones - 42
See LAND LAW (IRELAND) ACTS. 6.

SEPARATION DEED—Agreement not to sue - - - - - - 618, 630
See FOREIGN ACTION.

SETTLEMENT—*Construction—Trust for husband for his life, or till bankruptcy, or till execution—Limitation over on the happening of any such events.*] By settlement, dated the 15th August, 1890, executed subsequently to the marriage of *E. O.* and *M. O.*, in pursuance of marriage articles prior to the said marriage, in consideration of £400 paid by the said *M. O.*, the wife, to *E. O.*, the husband, freehold property of the wife, and chattels real, and chattel property of the husband, were vested in trustees, upon trust for *E. O.* during his natural life, or until he should become bankrupt or unable to meet his engagements, or until he should do or suffer any act whereby the whole or any part of the premises should be seized, sold, or taken in execution: upon the happening of any of which such events the trustees should hold the premises upon trust to immediately raise thereout £750, to be paid to the said *M. O.* should she be then living, or, should she be then dead, to the child or children of the marriage then living in equal shares; and the sum of £750 was thereby charged on all the said premises; and, subject to the said charge, to hold all the said premises for the said *E. O.*, his heirs, executors, administrators, and assigns. There was issue of the marriage four children. *E. O.* died in 1898 intestate:—*Held*, that *M. O.* was entitled, on the death of her husband, to have the sum of £750 raised for her benefit. *O'Donoghue* v. *O'Donoghue* - - - - - - L. C. 482

—— Lease subject to 7 Geo. 4, c. 29—Consent of landlord not obtained — Covenant for further assurance - - - 20
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—— Representation that lands are unincumbered — Mortgage — Purchaser for value of unsettled lands - - - 305
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SOLICITOR—Independent—Transactions held to be fraudulent - - - 416
See FRAUD.

—— Taxation of costs.
See TAXATION OF COSTS.

SOLVENT ESTATE—Undivided moieties—Life estate of vendor in one insolvent—Bonus - - - - - 300
See BONUS. 2.

SPORTING RIGHTS—Reservation of—Judicial tenancy—Natural obstruction 373
See FISHERY.

STATUTE OF LIMITATIONS.
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STATUTES:
7 Geo. 4, c. 29—Landlord and Tenant, s. 3 20
See COVENANT FOR FURTHER ASSURANCE.
10 Geo. 4, c. 7—Roman Catholic Relief
See MONASTIC ORDER. 1, 2. [505, 539
3 & 4 Wm. 4, c. 27—Limitations, ss. 40–42
See POWER. [220, 224
8 & 9 Vict. c. 18—Lands Clauses Consolidation, s. 80 - - - - - 557
See PAYMENT OUT OF COURT.
12 & 13 Vict. c. 105—Renewable Leasehold Conversion, s. 22 - - - 159
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See BONUS. 1, 2.
4 Edw. 7, c. 34—Irish lands, s. 3 - 661
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STAYING PROCEEDINGS—*Practice— Former action between same parties for the same cause*— Res Judicata — *Estoppel — Frivolous and vexatious proceeding — Infant.*] *B.*, who had carried on the business of a tailor and stationer at Ballymena, in the county of Antrim, by his will, dated the 7th October, 1900, left his property to the defendants, his executors and trustees, on trust to carry on his business, with a power to sell if they thought fit. *B.* died in December, 1900, leaving a widow and two sons, both minors. The defendants appointed Mrs. *B.* to manage the stationery business, and appointed a manager to carry on the tailor's shop, but after three months it was discontinued. The plaintiff stated that Mrs. *B.* was, to the knowledge of the defendants, of intemperate habits, and in consequence the business fell off, and the assets were wasted. In January, 1902, the defendants sold the stationery business for £500. Mrs. *B.* died on the 16th July, 1902. In November, 1902, an action was brought on behalf of *W. B.* and *H. B.*, the sons of the testator, who were then minors, by *D. B.*, their next friend, against the defendants (1) for administration of the assets of *B.*, and (2) for an account of the assets on the basis of wilful default. The action was tried before Barton, J., in January, 1904, who held that the defendants had not been guilty of wilful default, and dismissed the action. After the trial it was alleged by *W. B.* that the next friend of the minors entered into an agreement not to appeal against the decision, and that this agreement was made, not in the interest of the minors, but that it was part of a compromise which included other matters in which the minors had no interest. *W. B.* came of age in 1905, and brought an action against the same defendants (1) for administration of his father's assets, and (2) for a declaration that the defendants had been guilty of wilful default. The plaintiff averred in his pleading that the facts in connexion with the management and discontinuance of the tailoring business had been omitted from the former action; that the plaintiff was entitled to have the decree set aside for fraud, the fraud consisting of the

STAYING PROCEEDINGS—*continued.*
denial by the defendants at the former trial of Mrs. *B.*'s habits of intemperance; that the plaintiff was entitled to an ordinary decree for administration; and that the time for appealing having expired before the plaintiff came of age, it was impossible for the plaintiff to obtain redress except by a second action. The defendants moved to stay the proceedings, on the ground that the plaintiff's claim was barred by the judgment in the former action, and that the proceedings were frivolous and vexatious:—*Held*, by the Master of the Rolls, (1) that the plaintiff was not estopped from proceeding by the judgment in the former action, and (2) that the circumstances in connexion with the alleged agreement against the appeal were such that the action should not be stayed. *Held*, by the Court of Appeal, that the judgment of the Master of the Rolls should be affirmed on the second ground, without expressing any opinion on the first. *Blair* v. *Crawford* M.R. 578; App. 584

SUPERIOR INTEREST — Apportionment—Security—Personal covenant—Redemption - - - - - - 550
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SURVIVORSHIP—Gift to children surviving parents—Vesting - - 333, 353
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TAXATION OF COSTS—*Conveyance—Solicitor—Remuneration—Costs of comparison of engrossment with draft—"Deed or instrument"—Schedule of Fees of* 1859—19 *&* 20 *Vict. c.* 92.] The solicitor of a grantor is entitled to be allowed his costs of comparing the engrossment of grant and memorial with draft conveyance, as being a charge within item 141 in the Schedule of Fees of 1859, "for perusing or comparing any deed or instrument, when necessary." *In re Montgomery-street Area Scheme and Pilkington* - - - M.R. 478

2. —— *Provisional Order of Local Government Board—Housing of Working Classes Act,* 1890 (53 *&* 54 *Vict. c.* 70.)—*Chancery or Parliamentary scale.*] The costs incidental to procuring a Provisional Order from the Local Government Board under the Housing of the Working Classes Act, 1890, are taxable on the Parliamentary scale. *Lurgan Urban District Council* to *Moore and Johnston* - - - - - - App. 599

TENANT FOR LIFE AND REMAINDERMAN—Graft - - - 320
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TIME—Vesting - - - - 333, 353
See Vesting.

TREASURY—Obligation to make regulations—Land Law (Ireland) Act, 1903, s. 44 434
See Congested Estate.

TRUST—For husband for life or till bankruptcy or execution—Limitation over—Settlement—Construction - - - 482
See Settlement.

TRUSTEE—*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 61), *section* 26 (6)—*Constructive trustee—Contract to convey real estate—Refusal to execute conveyance—Vesting order.*] *A* (a Scotch peer) was entitled to the lands of *H.*, in the county of Wexford, in fee-simple; he was also entitled, as first heir of entail by Scotch law, to a sum of £30,000, of which his eldest son *B* was next heir of entail. This sum of £30,000 represented the balance of the purchase-money of a settled estate in Perthshire, which had just been sold. By agreement in writing, dated the 30th March, 1892, *A* agreed with *B* that, in consideration of *B* consenting to disentail the £30,000, and agreeing that out of that sum the debts of *A*, to the extent of £9000, should be paid; that an annuity of £1000 should be secured for the lives of *A* and his wife and the survivor; that the remainder of a sum necessary to secure portions for younger children should be provided, and that the balance of the fund should be secured for *B*, *A* agreed to convey the lands of *H.* to trustees upon certain trusts, with a power of sale. The terms of agreement had all been carried out, except the conveyance of the *H.* estate, which *A* refused to execute. An action was brought in the Court of Sessions in Edinburgh, in which a decree was obtained, ordering him to execute the conveyance; but he refused to do so. On an application under section 26 of the Trustee Act of 1893, for an order vesting the *H.* estate in the trustees of the agreement;—*Held* (reversing the decision of Barton, J.), that *A* was a trustee within section 26 of the Trustee Act of 1893, and that a vesting order should be made. *In re Ruthven's Trusts* - - App. 236

2.——*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 44—*R. S. C., Ir.,* 1905, *Order LXXVII., R.* 3—*Power to sanction sale of land and minerals separately—Form of order—Practice.*] The trustees of a settlement, having power of sale with the consent of the tenant for life and her husband, agreed to sell the minerals under part of the settled land, apart from the land, to a tenant who held the minerals under a lease, and applied to the Court on motion, under sect. 44 of the Trustee Act, 1893, to sanction the sale:—The Court made an order in the terms of the section, without entering into the question whether the sale was a beneficial one. *In re Hallowes' Settlement* - - - - M.R. 526

—— Innocent of fraud - - - - 416
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—— New trustees — Appointment of — Existing trustee—Vesting order - - 531
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UNITY OF TITLE—Lease and Reversion—Renewal fines—Fee-farm grant - 159
See Renewable Lease.

UNTENANTED LANDS—*Land Purchase Acts—Irish Land Act*, 1903, *ss.* 6, 7—"*Estate*"—*Wholly untenanted lands—Power of the Estates Commissioners to purchase.*] The Estates Commissioners have power to purchase lands which are wholly untenanted, under the provisions of sect. 7 of the Irish Land Act, 1903. *Semble*: The Estate Commissioners have similar powers under sect. 6. *In re White's Estate*; *Scottish Equitable Society, Petitioners* - MEREDITH, J., 186; APP. 193

VENDOR AND PURCHASER—*Contract for sale of freehold premises—Vacant possession—Non-completion on appointed day—Interest on purchase-money—"Wilful default" of vendors.*] By agreement for the sale of certain freehold premises to the Postmaster-General, it was provided that the purchase should be completed on the 1st August, 1904; that on completion the purchaser should be given clear possession; that the purchaser should pay the purchase-money on that date; and that if, from any cause other than the wilful default of the vendors, the purchase should not be completed on or before that date, the purchaser should pay interest on the purchase-money. The vendors were in a position, shortly after 1st August, 1904, to give vacant possession of all the premises, save one holding, which they had assumed to have been held under a quarterly tenancy. On that assumption they had served a three months' notice to quit for August 1st; but in ejectment proceedings it was held that the tenancy was a yearly one, commencing on May 1st, and that therefore the notice was insufficient. The premises consisted of a licensed publichouse, which had been held for more than thirty years at an annual rent, payable quarterly. The tenancy had commenced on May 1st, 1871, but the vendors had no record or recollection of the exact terms of the letting. As a result, the vendors were not in a position to complete until 29th June, 1905:—*Held*, that, in assuming the tenancy to be quarterly, and in fixing the date for completion on that assumption, the vendors had been guilty of wilful default, and that therefore they were not entitled to be paid interest on the purchase-money. *In re Postmaster-General and Colgan's Contract* BARTON, J., 287; APP. 477

—— Sale by administrator—Title - - 656
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VESTING—*Presumption in favour of—Will—Gifts to children contingent upon surviving their parents.*] A testator left a share of his property to trustees, upon trust for his son *G.* for life, or until he should become bankrupt, and after his death or bankruptcy to *E.*, the wife of *G.*, for life, and directed that in case there should be any child or children of *G.* living at the death of the survivor of *G.* and *E.*, or at the other period thereinafter contemplated, then, from and immediately after the death of the survivor of *G.* and *E.*, or from and after the death of *E.* and the bankruptcy of *G.*, the said share should be held in trust for all and every, or such one or more exclusively, of the others or other of the children or child of *G.* by his then or any future wife, with such provisions for their respective maintenance, education, and advancement, at such ages, days, and times, and if more than one in such shares, as *G.* should by deed or will appoint; and, in default of such appointment, in trust for all and every such the children and child of *G.*, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or day of marriage, and if more than one in equal shares; and in case there should be only one such child, then the whole for such one or only child; provided that after the death of the survivor of *G.* and *E.*, or the death of *E.* and the bankruptcy of *G.*, and until the whole of the trust funds should become vested in such child or children, his trustees should apply a competent part of the income of the trust funds for the benefit of the children or child for the time being entitled thereto in expectancy towards his or her maintenance and education; and in default of such child or children of *G.*, upon the trusts in his will declared concerning the premises thereby given in trust for his daughter *I.*, and the other persons therein mentioned. *G.* had one son *J.*, who attained age, married, and predeceased *G.*, leaving children. *E.* predeceased *G.*, who died without having become bankrupt:—*Held*, by the Court of Appeal, affirming the decision of the Master of the Rolls, that the rule in *Emperor* v. *Rolfe* (1 Ves. Sen. 208) was applicable, and that *J.* took an absolute interest in the property on attaining age, although he did not survive *G.* *Duffield* v. *M'Master*
[M.R. 333; APP. 353

VESTING ORDER—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 26, 35—*Jurisdiction—Appointment of new trustees—Existing trustees.*] The jurisdiction of the Court to make a vesting order under sections 26 and 35 of the Trustee Act, 1893, embraces a case where the trustees in whom the property is to be vested have been already appointed. *In re Kenny's Trusts* - - - M.R. 531

—— Constructive trustee—Refusal to convey—Practice - - - - - 236
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VOID BEQUEST—Gift to Monastic Order
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WILFUL DEFAULT—Vendor and purchaser — Non-completion by appointed day — Interest - - - - 287, 477
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WILL— Charitable bequest — Establishment of community of Christian Brothers for teaching purposes - - 588, 594
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—— Charitable bequest — Gift for masses — No direction for celebration in public 247
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—— Charitable bequest—Religious purposes 127
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—— Gift to children on surviving their parents—Presumption in favour of vesting
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—— Money — Whether passing under gift of "whatever is in house"— Residuary clause—Words *ejusdem generis* 649, 655
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—— Residuary bequest to executor — Whether conditional on acceptance of office
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THE END.

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